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UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW:

CLARIFYING DISPARATE TREATMENT ANALYSIS AFTER

ST. MARY'S HONOR CENTER V. HICKS

A Thesis
Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed in this thesis are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

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42D JUDGE ADVOCATE OFFICER GRADUATE COURSE

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UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW: CLARIFYING DISPARATE TREATMENT ANALYSIS AFTER *ST. MARY'S HONOR CENTER V. HICKS*

MAJOR THOMAS D. MILLER

ABSTRACT: In *St. Mary's Honor Center v. Hicks*, a bitterly divided Supreme Court clashed over the extent and nature of the plaintiff's final burden of persuasion under the *McDonnell Douglas-Burdine* disparate treatment analysis for resolving complaints of intentional employment discrimination under Title VII of the Civil Rights Act of 1964. The consequence is potential uncertainty in the law. This thesis will attempt to alleviate that uncertainty by proposing a clarification of disparate treatment analysis in light of *Hicks* that is based on the application of Federal Rule of Evidence 301. This clarification will reinforce the *McDonnell Douglas-Burdine* framework and result in a clearer understanding of disparate treatment analysis.

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UNDERSTANDING EMPLOYMENT DISCRIMINATION LAW: CLARIFYING DISPARATE TREATMENT ANALYSIS AFTER *ST. MARY'S HONOR CENTER V. HICKS*

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I. Introduction

The exclusive judicial remedy for a federal employee complaining of employment discrimination is Title VII of the Civil Rights Act of 1964.[1] Congress enacted Title VII[2] to eliminate invidious employment discrimination on the basis of race and other impermissible classifications.[3] Specifically, Title VII makes it unlawful for an employer to discriminate against any person in hiring, discharging, or taking other personnel actions on the basis of race, color, religion, sex, or national origin.[4]

Since Congress passed the original law, the courts have developed two principal theories of employment discrimination under Title VII: disparate impact and disparate treatment.[5] Disparate impact claims consist of facially neutral employment practices adopted without discriminatory intent that, nevertheless, have a substantial adverse impact upon a protected group.[6] Disparate treatment claims, on the other hand, involve intentional discrimination by employers against individuals because of their membership in a protected group.[7] The disparate

treatment theory of Title VII employment discrimination is the focus of this thesis.

The Supreme Court articulated an analytical framework for Title VII disparate treatment cases principally in *McDonald Douglas Corp. v. Green*[8] and *Texas Department of Community Affairs v. Burdine*.[9] These cases established a three-part order and allocation of proof for deciding claims of intentional employment discrimination using indirect evidence. First, the Court stated that the plaintiff has the burden of establishing by a preponderance of the evidence a prima facie case of employment discrimination.[10] If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory employment action.[11] Finally, if the employer meets its burden, the Court said the plaintiff must have the opportunity to prove by a preponderance of the evidence that the employer's articulated reason is a pretext for discrimination.[12] The Court stated that the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff.[13]

In the last several years, the Supreme Court issued several controversial decisions under Title VII.[14] Seven of these cases[15] eventually provided the impetus for the passage of the Civil Rights Act of 1991.[16] More recently, in *St. Mary's Honor Center*

v. Hicks,[17] the Supreme Court handed down another controversial decision.[18] Over a vigorous four-justice dissent,[19] the *Hicks* Court held that the plaintiff's proof in a disparate treatment case that the employer's proffered reason for its employment action is pretextual does not entitle the plaintiff to judgment as a matter of law. To prevail under the *McDonnell Douglas-Burdine* framework, the majority held the plaintiff must also show that the employer's action was the result of intentional discrimination.[20] *Hicks* is critical because most disparate treatment cases are analyzed under the *McDonnell Douglas-Burdine* framework[21] and decided on the issue of pretext.[22]

The dissent attacked the majority's "unfair and unworkable" opinion that, it believed, abandoned twenty years of precedents in this area.[23] Panic did not break out in the courts, however, as the majority predicted would be the case.[24] Nevertheless, while *Hicks*'s reception in the courts of appeals has been favorable, the Supreme Court's history of confusing Title VII decisions coupled with the rancorous difference in the *Hicks* opinions[25] hold out the possibility that *Hicks* may need further clarification.

The Supreme Court correctly decided *Hicks*. In so doing, however, it became preoccupied with defending itself against the dissent's bitter charges instead of affirmatively stating its case. The consequence is potential uncertainty. A clarification

of *Hicks* based on the application of Federal Rule of Evidence 301 would reinforce the *McDonnell Douglas-Burdine* framework and alleviate any confusion. This would result in a clearer understanding of disparate treatment analysis. This thesis will propose such a clarification.

Part II of this thesis provides background and foundation by discussing the general provisions of Title VII. Part III addresses the evolution of the disparate treatment analysis designed by the Supreme Court to enforce Title VII. Part IV briefly reviews relevant provisions of the Civil Rights Act of 1991. Part V discusses *Hicks* from the split of opinion on the issue of pretext in the circuit courts of appeal through the lower court decisions in *Hicks* and on to the Supreme Court decision, including both the majority and dissenting opinions. Finally, Part VI proposes a clarification of disparate treatment analysis in the wake of *Hicks* that is consistent with *McDonnell Douglas-Burdine* and based on Federal Rule of Evidence 301 while remaining faithful to Title VII.

II. Title VII Of The Civil Rights Act Of 1964: The Statutory Basis For Employment Discrimination Law

> Race discrimination hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It

mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the cost of public welfare, crime, delinquency, and disorder. Above all, it is wrong. (President John F. Kennedy, Feb. 28, 1963).[26]

With that call to action, Congress enacted Title VII of the Civil Rights Act of 1964, the first major federal legislation to prohibit invidious employment discrimination.[27] Title VII makes it unlawful for employers, employment agencies, and labor organizations engaged in an industry affecting commerce to discriminate in employment decisions because of race, color, religion, sex, or national origin. Specifically, § 703 provides that:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees

> or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[28]

In other words, Title VII makes it illegal for employers to consider certain characteristics in making employment decisions.[29]

Title VII seeks to eliminate such discrimination through formal and informal remedial procedures.[30] To this end, it established the U.S. Equal Employment Opportunity Commission, a five member, presidentially-appointed federal agency, and delegated to it the primary responsibility for preventing and eliminating unlawful employment practices and investigating complaints of unlawful discrimination under Title VII.[31]

Title VII does not make all unfair employment actions against members of protected groups unlawful. Title VII applies only under certain, but broadly construed,[32] statutorily prescribed circumstances. First, the defendant must be an employer, employment agency, or labor organization engaged in an industry affecting commerce that employs at least fifteen persons for twenty weeks during the current or preceding calendar year.[33] Second, the plaintiff must belong to a group protected by race,

color, religion, sex, or national origin.[34] Third, in the case of employers, the alleged discriminatory act must relate to hiring, discharge, compensation, or other terms, conditions, or privileges of employment.[35] Finally, there must be a causal connection or nexus between the plaintiff's membership in a protected group and the employer's alleged discriminatory employment action.[36] This final element is the key battleground in most employment discrimination litigation and the issue the *McDonnell Douglas-Burdine* framework was designed to confront.

III. *McDonnell Douglas-Burdine*: The Origin And Evolution Of Disparate Treatment Analysis For Resolving Claims Of Intentional Employment Discrimination

Disparate treatment theory under Title VII involves intentional discrimination by employers against individuals because of their membership in a protected group.[37] Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[38]

A disparate treatment case is usually an individual complaint where the focus is on the employer's motivation for the employment action taken.[39] Proof in such cases can be by direct evidence, of course.[40] Generally, however, there is no direct

evidence of discrimination and plaintiffs in disparate treatment cases must rely on indirect evidence from which an inference of the employer's discriminatory motive may be drawn.[41] *McDonnell Douglas* was the first Supreme Court case to articulate the order and allocation of proof for indirect evidence cases of disparate treatment.[42]

A. McDonnell Douglas*: The Genesis Of Disparate Treatment Analysis*

In *McDonnell Douglas Corp. v. Green*,[43] the plaintiff, Green, was working for the corporation as a mechanic and laboratory technician when he was laid off as part of a general reduction-in-force. Green, a civil rights activist, protested that race motivated his discharge and McDonnell Douglas's general hiring practices. As part of the protest, Green and other activists illegally stalled their cars on main roads leading to McDonnell Douglas's plant blocking access to it during a morning shift change. A "lock-in" also took place in which protesters padlocked McDonnell Douglas employees in a building and prevented them from leaving. Green apparently knew beforehand about the "lock-in," but the full extent of his involvement remained uncertain. McDonnell Douglas later advertised for qualified mechanics and Green applied. McDonnell Douglas rejected Green's re-employment application on the ground of the illegal conduct.[44]

Green filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) charging McDonnell Douglas with violations of §§ 703(a)(1)[45] and 704(a)[46] of Title VII.[47] The EEOC found there was reasonable cause to believe that McDonnell Douglas's rejection of Green violated § 704(a),[48] which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions.[49] The EEOC made no finding on Green's allegation that McDonnell Douglas also violated § 703(a)(1),[50] which prohibits discrimination in any employment decision.[51]

Following unsuccessful EEOC conciliation efforts, Green filed suit in U.S. District Court. The court ruled § 704(a) did not protect McDonnell Douglas's illegal activity but dismissed the § 703(a)(1) racial discrimination claim because the EEOC made no specific finding on that allegation.[52] The Eighth Circuit affirmed the § 704(a) ruling, but reversed the § 703(a)(1) holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court.[53]

In remanding the case for trial on the § 703(a)(1) racial discrimination claim, the Eighth Circuit attempted to set forth standards for considering Green's case.[54] Specifically, the appellate court noted that Green established a prima facie case of employment discrimination, McDonnell Douglas's refusal to

rehire Green rested on "subjective criteria" that carried little rebuttal weight, and the trial court should give Green the opportunity to demonstrate that McDonnell Douglas's reasons for refusing to rehire him were mere pretext.[55] The Supreme Court granted certiorari.[56]

The "critical issue" for the Supreme Court was the "order and allocation of proof" in disparate treatment cases under Title VII.[57] As the Court saw it, the opposing factual contentions of the parties framed the issue. Green contended McDonnell Douglas denied him employment because he engaged in civil rights activities and because of his race and color. McDonnell Douglas contended Green was justifiably denied employment because of his participation in illegal conduct against the corporation.[58] From these opposing contentions, the Court laid out a three-stage order and allocation of proof from which the factfinder could infer discriminatory intent from indirect evidence.

At the first stage, the plaintiff has the burden of proving a prima facie case of employment discrimination. The plaintiff establishes this prima facie case by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that,

> after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[59]

The Court said it tailored these four factors to this case: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."[60] For example, the four factors listed have to be adapted to cases challenging other employment actions, such as discharges and failures to promote, or discrimination based on grounds other than race.

If the plaintiff succeeds in proving the prima facie case, the analysis moves to the second stage. At that stage, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[61]

Should the employer meet this burden, the analysis proceeds to the final stage of the analysis. There, the plaintiff must have a full and fair opportunity to prove by competent evidence that the employer's stated reasons for its employment action were not its true reasons, but were "a pretext for the sort of discrimination prohibited by" Title VII.[62] In language that would become the battleground in *Hicks*, the Supreme Court later explained that the plaintiff may do this "directly by persuading

the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence."[63]

The plaintiff's establishment of the prima facie case justifies the inference that the employer denied the plaintiff an employment opportunity for reasons prohibited by Title VII.[64] This is because the presence of these factors, if otherwise unexplained, are more likely than not based on impermissible considerations.[65] The Court is

> willing to presume this largely because [it] know[s] from . . . experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who [the Court] generally assume[s] acts only with *some* reason, based his decision on an impermissible consideration such as race.[66]

In other words, the factfinder may infer discrimination when the employer's conduct is otherwise inexplicable.[67]

"The burden of establishing a prima facie case of disparate

treatment is not onerous."[68] So, naturally, the Supreme Court focused on other parts of its *McDonnell Douglas* analysis in later cases. The initial cases considered the nature of the employer's burden "to articulate some legitimate, nondiscriminatory reason" for its employment action once the plaintiff had established a prima facie case.[69] These cases, however, created confusion that would take the Court three attempts to resolve.

B. Furnco *And* Sweeney*: The Genesis Of Confusion In Disparate Treatment Analysis*

In *Furnco Construction Corp. v. Waters*,[70] the employer specialized in relining blast furnaces with "firebrick." It maintained no permanent force of bricklayers; instead, Furnco delegated to the superintendent of a particular job the task of hiring competent workers. The plaintiffs, three black bricklayers, sought employment with Furnco's superintendent on a particular job. The job superintendent never offered employment to two of them, though both were fully qualified. The third black bricklayer worked for this superintendent previously. The superintendent hired him long after his initial application. The superintendent, following industry practice, did not accept applications at the job site but hired only bricklayers whom he knew were experienced and competent or who had been recommended to him as similarly skilled.[71]

The plaintiffs brought suit against Furnco in U.S. District Court claiming employment discrimination in violation of Title VII. The court concluded that the plaintiffs did not prove disparate impact under *Griggs v. Duke Power Co.*[72] and disparate treatment under *McDonnell Douglas*.[73] The Seventh Circuit reversed, holding the plaintiffs established a prima facie case of employment discrimination under *McDonnell Douglas* that Furnco did not effectively rebut and disagreeing with the lower court's finding on the disparate impact claim.[74] The Supreme Court granted certiorari.[75]

The Supreme Court agreed with the Seventh Circuit that the plaintiffs established a prima facie case of disparate treatment discrimination under *McDonnell Douglas*.[76] At that point, however, the two courts parted company. The Supreme Court held that the Seventh Circuit erred in its treatment of the nature of the evidence necessary to rebut a *McDonnell Douglas* prima facie case.[77] In the Supreme Court's opinion, the Seventh Circuit's error stemmed from its "equating a prima facie showing under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case."[78] In explaining the difference, however, the Supreme Court exposed a problem with its articulation of the employer's burden under *McDonnell Douglas*.

> When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of *proving* that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "*articulate* some legitimate, nondiscriminatory reason for the employee's rejection."[79]

"Proving" in the first sentence implies the employer acquires a burden of proof. "Articulate" in the second sentence implies a burden of production. The Supreme Court never clarified this internal contradiction anywhere else in *Furnco*.[80] As a result, the contradiction confused the nature of the employer's burden under *McDonnell Douglas*.

The Supreme Court attempted to resolve its *Furnco* problem in *Board of Trustees of Keene State College v. Sweeney*.[81] The problem arose there because the First Circuit stated below that "'in requiring the defendant to *prove* absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence,'" referring to *McDonnell Douglas*.[82] A majority of the Supreme Court disagreed. Citing *McDonnell Douglas* and *Furnco*, the Court held that to rebut

the plaintiff's prima facie case, the employer need only "*articulat[e]* some legitimate, nondiscriminatory reason" for its employment action.[83] The Court explained that if the employer's burden was to prove absence of discriminatory motive, it

> would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as part of the third step.[84]

Four justices dissented arguing that the First Circuit's "statement of the parties' respective burdens . . . [was] wholly faithful to" *McDonnell Douglas*, and the distinction drawn by the majority between "articulating" and "proving" was "illusory."[85] It was not until *Texas Department of Community Affairs v. Burdine*[86] that the Supreme Court would finally resolve the precise nature of the employer's burden in disparate treatment cases.

C. Burdine*: The Genesis Of Clarification In Disparate Treatment Analysis*

The Texas Department of Community Affairs (TDCA) employed a woman named Burdine. Burdine's supervisor, the Project Director,

resigned and she applied for the position. The position remained open for six months, however, and then TDCA reorganized the division where Burdine worked. TDCA discharged Burdine and named a male from another division to the Project Director position she sought. TDCA rehired Burdine and assigned her to another division where she received the same salary paid to the new Project Director at her old division. Subsequent promotions kept her salary and responsibilities commensurate with what she would have received as Project Director.[87]

Burdine filed suit in U.S. District Court under Title VII alleging that sex discrimination formed the basis for TDCA's failure to promote her and the subsequent decision to discharge her. After a bench trial, the court held that TDCA did not base either employment decision on Burdine's sex.[88] The Fifth Circuit reversed the lower court's finding that TDCA "sufficiently . . . rebutted" Burdine's prima facie case of sex discrimination in the decision to terminate her.[89] In doing so, the court reaffirmed its views that the employer "bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the employer also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff."[90]

The Supreme Court granted certiorari to decide whether, after the plaintiff established a prima facie case of disparate

treatment discrimination, the employer must satisfy its burden by a preponderance of the evidence[91] and reversed the Fifth Circuit. It held that once a Title VII plaintiff establishes a prima facie case of employment discrimination, the employer bears only the burden of producing evidence that the employment action taken against the plaintiff was for a legitimate, nondiscriminatory reason.[92]

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[93]

The Court clarified *McDonnell Douglas* to mean the employer bears only a burden of production when attempting to rebut the plaintiff's prima facie case of discrimination.[94] It is the plaintiff's burden to establish a prima facie case and prove pretext for discrimination by a preponderance of the evidence.[95] The Court also emphasized that the ultimate burden of persuading the factfinder that the employer intentionally discriminated remains at all times with the plaintiff.[96]

D. Aikens*: It's Discrimination, Stupid!*

All of this concern over the workings of the *McDonnell Douglas* framework distracted some courts into forgetting the underlying purpose of Title VII litigation. In the wake of *Burdine*, the Supreme Court took advantage of an opportunity to remind the courts that their focus must be on the ultimate issue of whether the employer intentionally discriminated against an individual on the basis of a classification protected by Title VII.

In *U.S. Postal Service Board of Governors v. Aikens*,[97] the plaintiff, a black postal worker, filed suit under Title VII claiming the Postal Service discriminated against him on the basis of race when it refused to promote him. The U.S. District Court found for the Postal Service. The District of Columbia Circuit reversed, however, holding that the lower court erred in requiring Aikens to offer direct proof of discriminatory intent and to show as part of his prima facie case that he was "as qualified or more qualified" than the people the Postal Service did promote.[98]

The Supreme Court remanded the case to the U.S. District Court to decide on the basis of the evidence already before it whether the Postal Service discriminated against Aikens.[99] The Court did so because the District Court believed the law required

Aikens to submit direct evidence of discriminatory intent and erroneously focused on the question of the prima facie case rather than directly on the question of discrimination.[100] The Court stated that once the employer produces evidence which sets forth "a legitimate, nondiscriminatory reason" for its employment action,[101] the establishment of a prima facie case "is no longer relevant" whether the plaintiff satisfied that initial burden or not.[102] At that point, the district court has all the evidence it needs to decide the issue of intentional discrimination.[103] The Court stressed that district courts should not lose sight of the ultimate issue in a Title VII case: whether the employer discriminated against the plaintiff or not.[104] "Basically, the Court stated that instead of focusing on whether the plaintiff established a prima facie case, the district court should decide the ultimate issue and determine whether the plaintiff sustained his burden of proving that the defendant intentionally discriminated against him."[105]

E. Price Waterhouse*: The Return To Uncertainty*

Aikens was a clarion call to the courts that they should concentrate on deciding cases based on the facts instead of concerning themselves so much with the finer points of the law. In *Price Waterhouse v. Hopkins*,[106] however, the Supreme Court departed from its own advice to carve out an exception to the *McDonnell Douglas-Burdine* framework for "mixed-motive" cases.

More importantly, *Price Waterhouse* pierced the facade of certainty that surrounded disparate treatment analysis after *Burdine*, and law that seemed settled now appeared subject to disruption.

Hopkins was a senior manager in an office of Price Waterhouse, a professional accounting partnership, when the firm proposed her for partnership. She was neither offered nor denied partnership. Instead, the firm held her candidacy for one year for reconsideration. When the partners in her office later refused to re-propose her for partnership, Hopkins sued in U.S. District Court under Title VII charging Price Waterhouse with sex discrimination in its partnership decisions.[107] The District Court found for Hopkins on the question of liability, holding that Price Waterhouse unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping.[108] The District of Columbia Circuit affirmed.[109] Both courts held that an employer who allows a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination to avoid liability and that Price Waterhouse had not carried this burden.[110]

The Supreme Court granted certiorari to resolve a conflict among the circuits concerning the respective burdens of the

plaintiff and the employer in a Title VII action when the plaintiff shows that an employment decision resulted from a mixture of legitimate and illegitimate motives ("mixed motives")[111] and reversed. A plurality of four justices, led by Justice Brennan, held that, contrary to *McDonnell Douglas-Burdine*, when a Title VII plaintiff proves that unlawful discrimination played a "motivating part" in an adverse employment decision, the burden of *persuasion* shifts to the employer who must prove by a "preponderance of the evidence" that it would have made the same decision in the absence of discrimination if the employer is to avoid liability.[112] The lower courts' only error, in the plurality's opinion, was in requiring Price Waterhouse to satisfy its newly-found burden of persuasion by "clear and convincing evidence."[113] Justices White and O'Connor concurred, but would have required the plaintiff to show that unlawful discrimination was a "substantial factor" in the employer's decision to warrant a shifting of the burden of persuasion to the employer.[114]

Both the plurality and concurring opinions in *Price Waterhouse* departed from the *McDonnell Douglas-Burdine* standard that the employer must satisfy only a burden of producing a nondiscriminatory reason for its employment action to survive the second part of disparate treatment analysis.[115] The six justices justified their departure on various grounds, mostly by arguing that shifting the burden of persuasion to the employer in "mixed

motive" cases was not a departure from the *McDonnell Douglas-Burdine* framework at all.[116] For Title VII litigants, however, *Price Waterhouse* again created uncertainty about the nature of the parties' burdens in employment discrimination law.

F. Patterson*: Some Calm Before The Storm*

In *Patterson v. McLean Credit Union,*[117] the Supreme Court briefly discussed the weight of evidence necessary to satisfy the plaintiff's burden to show pretext. Patterson, a black former employee of the credit union, brought suit charging her former employer with, among other things, racial harassment under 42 U.S.C. § 1981.[118] Section 1981 prohibited racial discrimination in the making and enforcement of private contracts.[119] The Supreme Court held that § 1981 covered only conduct at the initial formation of a contract and conduct that impaired the right to enforce contractual obligations through legal process; it did not cover on-the-job racial harassment that occurred after the formation of the employment contract and did not interfere with the right to enforce established contractual obligations.[120]

In the course of its opinion, the Supreme Court stated that the *McDonnell Douglas-Burdine* disparate treatment framework also applies to claims of racial discrimination under § 1981.[121] After noting that the Title VII plaintiff retains the ultimate burden of persuading the factfinder of intentional discrimination, the

Court reiterated that the plaintiff must also have the opportunity to show that the employer's proffered reasons for its employment action are pretextual.[122] The district court instructed the jury that Patterson could carry her burden of persuasion only by showing that she was in fact better qualified than the person who got the job.[123] The Supreme Court said the law does not limit the plaintiff to presenting evidence of a certain type on the issue of pretext; instead, a plaintiff can present evidence in a variety of forms.[124] For example, the plaintiff may prove pretext with sufficiently strong evidence of an employer's past treatment of the plaintiff.[125] The district court's limiting instruction was therefore error.[126]

IV. The Civil Rights Act Of 1991: The Introduction Of Damages And Jury Trials Into The Disparate Treatment Mix

Beginning in 1989, the Supreme Court issued several decisions that caused a furor in the civil rights community.[127] Seven of these cases, including aspects of *Price Waterhouse* and *Patterson*,[128] provided the impetus for the passage of the Civil Rights Act of 1991,[129] the most significant and far-reaching change in employment discrimination law since the Civil Rights Act of 1964.[130]

The most notable changes for disparate treatment plaintiffs made by the 1991 Act are the expansion of remedies and the

availability of jury trials. Title VII plaintiffs who cannot recover under 42 U.S.C. § 1981 may now receive compensatory and punitive damages from employers who engage in unlawful intentional discrimination.[131] These damages are not available to plaintiffs who proceed under a disparate impact theory of discrimination[132] and are in addition to the equitable remedies already available under Title VII.[133] Previously, compensatory and punitive damages were available only to victims of race or ethnic based discrimination under § 1981.[134] The 1991 Act limits these new damages, however. Punitive damage are not available to government employees,[135] and there is a cap of from $50,000 to $300,000 on compensatory damages depending on the size of the employer.[136] If the plaintiff does seek compensatory or punitive damages for unlawful intentional discrimination under Title VII, any party may demand a jury trial.[137]

These changes are significant because they represent a fundamental shift in employment discrimination theory.[138] The emphasis of Title VII's original provisions was on employer-employee conciliation through EEOC enforcement procedures instead of litigation, which was restricted.[139] The 1991 Act changes this emphasis from conciliation with equitable remedies to litigation with tort-like damages for disparate treatment claims.[140] The allure of possibly large damage awards promises to increase the number of intentional discrimination complaints,[141] making a clear and coherent framework for analyzing disparate treatment claims

all the more imperative.

The 1991 Act preserves *Price Waterhouse*'s burden-shifting departure from *McDonnell Douglas-Burdine* for "mixed motive" cases.[142] The only aspect of *Price Waterhouse* it reverses is the holding that employers who prove they would have taken the same employment action even absent the discriminatory motive are absolved from Title VII liability.[143] Now, if the Title VII plaintiff proves the employer had a discriminatory motive and the employer demonstrates that it would have taken the same action absent the impermissible motivation, the employer may be liable for declaratory and injunctive relief as well as the plaintiff's attorney's fees and costs directly attributable to pursuit of the claim.[144] There is no entitlement to reinstatement, back pay, or compensatory or punitive damages under such circumstances, however.[145]

The 1991 Act also overrules *Patterson*, amending 42 U.S.C. § 1981 to prohibit discrimination in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[146] Congress left undisturbed the Supreme Court's language in *Patterson* that the law does not limit the plaintiff in presenting evidence on the issue of pretext.[147]

Fortunately, the 1991 Act does not further confuse disparate

treatment analysis by legislatively changing the *McDonnell Douglas-Burdine* framework for intentional discrimination cases.[148] For the present, that implies congressional approval of the *McDonnell Douglas-Burdine* analysis as it existed in 1991.[149] That was, however, before *Hicks* arrived on the scene.

V. *St. Mary's Honor Center v. Hicks*

A. Prelude to Hicks*: The Split in the Circuits*

St. Mary's Honor Center v. Hicks[150] is the latest in the line of Supreme Court decisions that seeks to clarify some part of the *McDonnell Douglas-Burdine* order and allocation of proof for disparate treatment claims. *Hicks* arose because of a split among the federal circuit courts of appeal over the nature and extent of the plaintiff's burden at the final stage of the *McDonnell Douglas-Burdine* analysis.[151] Some circuits adopted the so-called "pretext-plus" rule.[152] Under this rule, a finding that the employer's proffered explanation for its employment action is untrue does not mandate a Title VII violation unless the plaintiff shows it is "pretext for discrimination."[153] Other circuits adopted the "pretext-only" rule,[154] which holds that proof of pretext alone mandates a finding of Title VII discrimination.[155] Champions of both rules cited *Burdine* as the controlling authority.

For the "pretext-plus" courts, the key language in *Burdine* comes from its explanation of the final step of the *McDonnell Douglas* analysis: "Third, should the defendant carry [its] burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination*."[156] In the First, Fourth, Seventh, and Tenth Circuits, this meant the plaintiff's proof that the employer's proffered reason for its employment action was pretextual did not compel judgment for the plaintiff unless the plaintiff proved the reason was pretext *for discrimination* against a class protected by Title VII.[157] These courts believed that holding otherwise would render Title VII little more than a "bad acts" statute.[158]

The "pretext-plus" circuits also reasoned that an employer's pretextual explanation may be a cover for a host of motives, both proper and improper.[159] These courts suggested these nondiscriminatory motives could include violations of civil service system rules or collective bargaining agreements,[160] personal or political favoritism,[161] grudges,[162] random conduct,[163] or errors in the administration of neutral rules."[164] Such grounds for action do not arise from a discriminatory motive based upon a person's protected status; thus, there can be no Title VII liability even if the plaintiff shows that the proffered reason is otherwise pretextual.[165]

For the "pretext-only" courts, the critical *Burdine* language was the description of the types of pretext showings that satisfy the plaintiff's ultimate burden of persuasion.[166] Specifically, *Burdine* provides that the Title VII plaintiff "may succeed in [demonstrating pretext] either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly by showing that the employer's proffered explanation is unworthy of credence*."[167] For the Second, Third, Fifth, Sixth, Eighth, and District of Columbia Circuits, therefore, the highlighted language meant plaintiff's proof of pretext alone mandated a finding of Title VII discrimination.[168] These courts reasoned that, by showing that the reason offered by the employer to rebut the plaintiff's prima facie case is pretextual, the case returns to the establishment of the prima facie case. At that point, courts may presume that unlawful discrimination motivated the employer in the absence of any other reason for the employment action, as explained by the Supreme Court in *Furnco*.[169]

B. Hicks *Before the Lower Courts*

1. The District Court Decision.—Hicks began in the U.S. District Court for the Eastern District of Missouri.[170] In that court, Melvin Hicks, a black former shift commander and corrections officer, filed a three-count complaint against his former employer, St. Mary's Honor Center, a minimum security

correctional facility operated by the Missouri Department of Corrections and Human Resources (MDCHR), and its superintendent, Steve Long.[171] In the first count, Hicks alleged that St. Mary's violated Title VII by demoting and then terminating him because of his race.[172] In the second count, Hicks alleged that St. Mary's and Long violated 42 U.S.C. § 1981,[173] which at the time prohibited discrimination in the formation and enforcement of contracts.[174] In the third count, Hicks alleged that Long violated 42 U.S.C. § 1983 by demoting and then terminating Hicks because of his race.[175] The court granted summary judgment for the defendants on the § 1981 count before proceeding to try the remaining two counts.[176]

The district court made the following findings of fact after a bench trial: Hicks was a correctional officer at St. Mary's before his promotion to shift commander, a supervisory position, in 1980. In 1983, MDCHR investigated the administration of St. Mary's because of complaints about poor maintenance, inadequate security, and other concerns about the facility. As a result of the review, St. Mary's demoted or terminated several supervisors and hired several new people in January 1994. Among the new hires were Steve Long, one of the defendants, who became the superintendent of St. Mary's, and John Powell, who became chief of custody. Long and Powell are both white.[177]

Before 1984, Hicks had a satisfactory employment record, his

supervisors consistently rated his performance as competent, and he had never been disciplined. In March 1984, however, Hicks became the subject of a series of disciplinary actions after coming under Powell's supervision.[178]

On March 3, while Hicks was on duty as shift commander, two transportation officers observed several violations of institutional rules. One of the officers reported these violations to Powell. A disciplinary review board composed of two blacks and two whites recommended a five-day suspension for Hicks. Hicks was later suspended. There was no discipline for the black subordinates who actually committed the violations, however. Powell testified it was his policy to discipline only the shift commander for violations that occur during his shift.[179]

On March 19, Hicks gave two correctional officers permission to use a St. Mary's car. Institutional rules required logging the use of a St. Mary's car, but neither officer nor the control center officer on duty at the time made the required log entry. Powell sought disciplinary action against Hicks and a disciplinary review board composed of two blacks and two whites recommended demotion for Hicks for failing to have the use of the car logged. Powell, who was on the disciplinary board, voted to terminate Hicks. St. Mary's later demoted Hicks from shift commander. St. Mary's did not discipline the officers who borrowed the car, both of whom were black, or the control officer

on duty, who was white.[180]

On March 21, while Hicks was still a shift commander, two inmates got into a fight. One of the inmates was injured and required emergency medical treatment. Hicks drafted a memorandum to Powell notifying him of the fight and the inmate's injury. Hicks also ordered the correctional officer who escorted the injured inmate to the hospital to write a report on the incident. On March 24, Powell submitted a report to Long charging Hicks with failure to investigate the assault. On March 29, Powell gave Hicks a letter of reprimand for failing to investigate the assault.[181]

On April 19, Long, Powell, and Vincent Banks, the assistant superintendent, notified Hicks of his demotion. After hearing the news, Hicks requested and was granted the day off. As Hicks was leaving, Powell followed and "provoked him into behaving irrationally." Powell ordered Hicks to open his locker so Powell could take Hicks's shift commander manual. Hicks refused and the two men exchanged heated words. Hicks said he would "step outside" with Powell. Powell warned Hicks that his words could be perceived as a threat. Hicks left without further incident.[182]

Powell sought disciplinary action claiming that Hicks had threatened him. A disciplinary board, composed of at least two blacks, recommended a three-day suspension. Long recommended

termination for Hicks. Long testified that he based his recommendation on the accumulation and severity of Hicks's violations. St. Mary's terminated Hicks on June 7. In contrast, St. Mary's did not discipline Arthur Turney, a white correctional officer, for insubordination to his supervisor, Hicks. In April, Hicks recommended disciplinary action after Turney cursed Hicks with highly profane language because of a poor service rating Turney received from Hicks. Powell concluded that Turney was "merely venting justifiable frustration."[183]

During this same period from January through June 1984, Hicks reported violations of institutional rules on numerous occasions by white correctional officers, but his reports were generally ignored. For example, Hicks reported an incident to Powell in which a white transportation officer named Ratliff allowed his brother to bring a gun into St. Mary's without checking it at the front desk. This happened despite specific instructions from Hicks that the gun should be checked. Powell took no disciplinary action. Hicks later notified Powell of an incident in which Ratliff instructed an inmate to climb over a wall into Long's locked office so Ratliff could obtain some inmate work passes that were inside. Despite the security breach, there was no discipline for Ratliff. On two occasions in March, Hicks found the front desk unattended. Apparently both times the shift commander on duty, a white, was aware of the front desk officer's absence and ordered the control center

officer to open and close the front door. Hicks reported these violations but nobody—including the shift commander—received discipline. On another occasion, there was no discipline for the same shift commander when Hicks reported that he found two doors that were supposed to be locked at all times left open on her watch. Hicks also reported an incident in April 1984 in which a white correctional officer took a set of St. Mary's keys home with him. No discipline followed. Another incident occurred that same month when an inmate escaped due to a white correctional officer's admitted negligence. The officer received only a letter of reprimand.[184]

From December 1983 to December 1984, St. Mary's fired approximately twelve blacks and one white. During this same period, the number of blacks hired at St. Mary's was approximately the same as the number of blacks fired.[185]

Finally, Hicks introduced evidence of a two-year study of honor centers in St. Louis and Kansas City. The study conducted a comprehensive comparison of the two institutions and suggested means of improvement. It found too many blacks were in positions of power at St. Mary's and the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. There was, however, no evidence submitted at the trial that St. Mary's personnel were aware of the study at the time of the 1984 personnel changes.[186]

Applying the *McDonnell Douglas-Burdine* analysis to the Title VII claim, the district court concluded that Hicks proved a prima facie case of race discrimination, St. Mary's set forth legitimate, non-discriminatory reasons for demoting and terminating Hicks, and Hicks proved that St. Mary's reasons were pretextual.[187] The court entered judgment for St. Mary's, however, because Hicks did not prove that race motivated St. Mary's in its decisions to demote and then fire Hicks.[188]

St. Mary's stated reasons for demoting and discharging Hicks were the severity and the accumulation of Hicks's misconduct violations.[189] Hicks proved these reasons were pretextual by showing that his treatment was harsher than his co-workers for violations actually committed by subordinates, or he was the only employee disciplined at all.[190] The court, however, went on to state that, although Hicks proved pretext, the Title VII plaintiff still bears the ultimate burden of proof that race was the determining factor in an employer's decision.[191] Proof of racial motivation does not have to be by direct evidence, the court said. Instead, the Title VII plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation.[192]

The district court believed St. Mary's put Hicks on the fast track to termination. It was not clear to the court, however,

that Hick's race was the motivating factor. The court noted that, when St. Mary's suspended Hicks for violations of institutional rules, the subordinates who actually committed the violations but were not disciplined were black. When St. Mary's demoted Hicks for failing to log the authorized use of a vehicle, the subordinates who actually committed the violations but were not disciplined were, again, black.[193]

Hicks also introduced evidence of disproportionate firings of blacks at St. Mary's. During 1984, St. Mary's fired approximately twelve blacks but only one white. During this same period, however, St. Mary's hired thirteen blacks. From this the court concluded that the personnel changes did not create an inference of racial discrimination because the number of black employees at St. Mary's remained constant during this time.[194]

Hicks also argued that changes in supervisory personnel created an inference of discrimination. Before Long's arrival, five supervisors were black and one was white. After Long's arrival, two supervisors were black and four were white. The court rejected Hicks's argument, though, because the changes resulted from corrective action following the adverse MDCHR investigation of St. Mary's and there would have been three black supervisors if a black had not turned down a position offered to him.[195]

The court made two other points. First, the composition of the disciplinary review boards that each recommended disciplining Hicks was two blacks and two whites. Second, St. Mary's supervisors were unaware of a study Hicks introduced that warned that blacks possessed too much power at St. Mary's. So, though Hicks succeeded in proving that the reasons for his demotion and discharge were pretextual, he did not prove by direct evidence or inference that his race motivated this unfair treatment.[196]

2. The Court of Appeals Decision.—The Eighth Circuit reversed,[197] finding the trial court went too far in its analysis. It agreed with the lower court that Hicks succeeded in proving that St. Mary's proffered reasons for his demotion and discharge were pretextual. Where the district court erred, in the Eighth Circuit's view, was in its conclusion that Hicks did not prove by direct evidence or inference that Hicks's race motivated St. Mary's actions.[198] Citing the prevailing rule in its circuit,[199] the court held that once Hicks proved all of St. Mary's proffered reasons for its employment actions were pretextual, he was entitled to judgment as a matter of law.[200] This is because, the Eighth Circuit reasoned, *Burdine* says the Title VII plaintiff "may succeed in [demonstrating pretext] . . . indirectly by showing that the employer's proffered explanation is unworthy of credence."[201] If the plaintiff is successful, the case returns to the point of the establishment of the prima facie case where the courts may presume that unlawful discrimination motivated the

employer in the absence of any other reason for the employment action.[202] The Supreme Court granted certiorari and reversed.[203]

C. The Supreme Court Decision

The Supreme Court granted certiorari to determine whether, in a Title VII action alleging intentional discrimination, the factfinder's rejection of the employer's asserted reasons for its actions mandated a finding for the plaintiff as a matter of law.[204] Justice Scalia, writing for a five-justice majority, held that it did not.

With the understanding that its goal was to "'progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination,'"[205] Justice Scalia began his opinion by reviewing the first two parts of the *McDonnell Douglas* order and allocation of proof for disparate treatment cases. About the first part he stated that, once the plaintiff establishes a prima facie case by a preponderance of the evidence, a presumption that the employer unlawfully discriminated against the employee is created.[206] This presumption requires a finding that the plaintiff was the victim of unlawful discrimination unless there is an explanation.[207] Justice Scalia stated this presumption also shifts to the employer the burden of producing evidence that the employment action taken was for a legitimate, nondiscriminatory reason, which, if believed by the factfinder, would support a

finding that unlawful discrimination did not cause its action.[208] The ultimate burden of persuasion, however, remains with the plaintiff at all times.[209] So, Justice Scalia wrote, the *McDonnell Douglas* presumption operates the same as all presumptions, citing Federal Rule of Evidence 301.[210] It imposes on the party opposing the presumption the burden of producing evidence to rebut or meet the presumption, but does not shift to that party the burden of persuasion.[211]

Justice Scalia then discussed the effect of the employer's burden. If satisfied, the employer's burden of production becomes "irrelevant" because "'the presumption raised by the prima facie case is rebutted'" and "'drops from the case.'"[212] It is at that point that the plaintiff has the opportunity to demonstrate that the employer's proffered reason was not the true reason for its employment decision, but that, in Hicks's case, race actually motivated the action.[213] Justice Scalia reiterated that the plaintiff retains the ultimate burden of persuading the factfinder that the employer intentionally discriminated.[214]

With this understanding of the law, Justice Scalia compared the two lower court opinions. First, he noted the district court's conclusion that Hicks proved St. Mary's proffered explanation was pretextual but did not prove that it was pretext for racial discrimination.[215] Justice Scalia then noted that the Eighth Circuit reversed on the ground that merely proving pretext

entitled Hicks to judgment as a matter of law because, with its proffered reasons discredited, St. Mary's was in no better position than if it had remained silent after Hicks's establishment of his prima facie case.[216] Justice Scalia disagreed, stating that by sustaining its burden of production, St. Mary's had placed itself in a better position than if it had remained silent.[217]

Noting that the employer's burden of production involves no credibility assessment,[218] Justice Scalia explained his disagreement with the Eighth Circuit's reasoning by contrasting the different outcomes that result when the employer does and does not sustain its burden of production. At the close of the employer's case, the court must decide whether an issue of fact remains for the factfinder to determine. No issue of fact remains if a prima facie case is established but the employer fails to introduce evidence which, taken as true, permits the conclusion that there was a nondiscriminatory reason for the adverse employment action. In that case, the court must award judgment to the plaintiff as a matter of law.[219] A question of fact does remain, however, if the employer fails to sustain its burden but reasonable minds could differ about whether a preponderance of the evidence establishes a prima facie case.[220] On this point, both Justice Scalia and the Eighth Circuit would agree. On the other hand, if the employer does carry its burden of production, *McDonnell Douglas* is no longer relevant because

"'[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.'"[221] The presumption drops from the case and the factfinder proceeds to the ultimate factual question of intentional discrimination.[222]

Justice Scalia then stated that, contrary to the Eighth Circuit's opinion, compelling judgment for Hicks as a matter of law would disregard the fundamental principle of Federal Rule of Evidence 301 that a presumption does not shift the burden of proof and would also ignore the Court's previous admonitions that the Title VII plaintiff bears the ultimate burden of persuasion at all times.[223] The incredibility of an employer's explanation is not without utility, however. Though the presumption no longer remains, the inference of discrimination raised by the prima facie case together with disbelief of the employer's proffered reasons permits the factfinder to find intentional discrimination as a matter of fact in appropriate cases and award judgment for the plaintiff.[224]

Justice Souter's dissent challenged Justice Scalia's majority opinion on two points. Justice Souter first accused the majority of disrupting twenty years of settled precedent and abandoning the *McDonnell Douglas-Burdine* order and allocation of proof.[225] Then he contended that the majority's holding is unfair, unworkable, and will encourage employers to present false evidence to avoid adverse judgments.[226]

The focus of Justice Souter's first point is the dictum from *Burdine* that states the plaintiff can prove pretext directly or "'indirectly by showing that the employer's proffered explanation is unworthy of credence.'"[227] Although he stated that the majority "inexplicably casts aside" the *McDonnell Douglas-Burdine* analysis,[228] Justice Souter retreated from this broad conclusion and acknowledged that the real issue centered on the quoted passage from *Burdine*.[229] This became apparent during Justice Souter's initial explanation of the *McDonnell Douglas-Burdine* analysis, which is similar to that of Justice Scalia.[230] They parted company, however, over the effect of the employer satisfying its burden of production.

Citing *Burdine*, Justice Souter said that when the employer meets its burden, not only does the presumption of discrimination created by the prima facie case drop out, the employer's stated explanation frames the remaining factual issue of pretext.[231] Framing the pretext issue in this manner made no sense to Justice Souter unless it likewise narrowed the field of reasons the factfinder can invoke to rule for the employer.[232] The effect of the majority's opinion, in Justice Souter's view, is to extend the plaintiff's burden to demonstrate pretext to unarticulated reasons for the employment action in addition to the employer's articulated ones, or require the plaintiff to produce direct evidence of discriminatory intent.[233] Just as important, the

framing of the remaining factual issue, as Justice Souter described it, dovetails with the *Burdine* dictum that demonstration of pretext alone entitles the plaintiff to judgment.[234]

The second point of Justice Souter's dissent was that application of the *McDonnell Douglas-Burdine* analysis, as interpreted by the majority, will prove unfair to Title VII plaintiffs, impractical to all concerned, and unjustly beneficial to employers who lie to defend against disparate treatment cases.[235] It will be unfair because it places plaintiffs who do not have direct evidence of discrimination at a disadvantage; those plaintiffs will be forced to disprove all possible nondiscriminatory reasons whether articulated or not, assuming they can afford it.[236] It will be impractical because there will be more pretrial discovery, longer trials, increased expense and delay for all Title VII litigants, and increased burdens on the judiciary.[237] Finally, because employers who proffer a reason for their employment action will be in a better legal position than those who do not respond at all, it will encourage the offering of false evidence by employers who do not have a nondiscriminatory reason for their actions or have a reason too embarrassing to disclose.[238]

Justice Scalia answered both of these attacks in his majority opinion. He began by stating the Court has no authority

to impose liability upon an employer for alleged employment discrimination unless the employer has unlawfully discriminated.[239] Moreover, nothing in the law permits the Court to substitute for an unlawful discrimination finding the much different and much lesser finding that the employer's explanation for its employment action was not believable.[240] Justice Scalia acknowledged that the *Burdine* dictum on which Justice Souter relied has no meaning other than that the falsity of the employer's explanation alone is enough to compel judgment for the plaintiff.[241] The problem is that, if that dictum means literally what it says, it "contradicts or renders inexplicable" language in *Burdine* and other cases.[242] For example, earlier in *Burdine*, the Court described the final *McDonnell Douglas* step as the plaintiff's "'opportunity to prove . . . that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'"[243] *McDonnell Douglas* described the plaintiff's pretext burden as the plaintiff's opportunity to show the employer's proffered reasons "'were in fact a coverup for a racially discriminatory decision'" and were "'in reality racially premised.'"[244] For Justice Scalia, though, the clincher was *Aikens*. There the Court said, "in language that cannot reasonably be mistaken, that 'the ultimate question [is] discrimination *vel non*.'"[245]

Justice Scalia responded next to Justice Souter's contention that the majority's holding is unfair, unworkable, and will

encourage the presentation of false evidence.[246] He began by noting that the *McDonnell Douglas* framework is a procedural device and the law books are full of procedural rules that place the perjurer, initially anyway, in a better position than the truthful litigant who does not respond at all.[247] For example, untruthful responses spare the employer a default judgment for failing to answer a complaint under Federal Rule of Civil Procedure 55(a), an adverse judgment on the pleadings for failing to contest critical averments in the complaint under Federal Rule of Civil Procedure 12(c), and summary judgment for failing to submit affidavits that create a genuine issue of fact under Federal Rule of Civil Procedure 56(e).[248] Being deceitful, though, carries substantial risks the employer cannot ignore.[249] Next, Justice Scalia found the dissent's belief that the plaintiff must refute unarticulated reasons to be nonsensical.[250] Any reasons the employer proffers must be through the introduction of admissible evidence.[251] It did not make sense for the dissent to say that the employer who lies nevertheless succeeds in injecting unarticulated reasons into the case.[252] Finally, Justice Scalia noted that Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for its action; it only awards damages to employees who prove a discriminatory employment action.[253]

D. Appellate Court Responses To Hicks

Despite dire warnings to the contrary, Justice Scalia correctly predicted that panic would not break out in the courts.[254] Instead, *Hicks*'s reception in the courts of appeals has been favorable and their interpretations of *Hicks* generally in agreement.

The First Circuit's longstanding opinion has been that the third stage of the *McDonnell Douglas* framework requires evidence of pretext and evidence that reasonably supports a finding of discriminatory animus.[255] It views *Hicks* as resolving the split in the circuits in favor of this approach.[256] In doing so, the First Circuit states that, after the employer satisfies its burden of production, the *McDonnell Douglas* presumption is no longer relevant.[257] The plaintiff *may* attempt to prove intentional discrimination at the third stage with evidence of pretext alone, particularly if accompanied by a suspicion of mendacity.[258] When combined with the elements of the prima facie case, this could satisfy the plaintiff's ultimate burden of persuading the factfinder that the employer intentionally discriminated.[259] Such evidence may be direct or indirect.[260] In the context of a summary judgment motion,[261] the employer will prevail if the plaintiff does not introduce adequate direct or circumstantial evidence of discriminatory animus by the employer.[262]

The Second Circuit believes *Hicks* holds that proof that the

employer's proffered reason for its employment action is false does not compel judgment for the plaintiff as a matter of law and the plaintiff retains the ultimate burden of proving that the employer unlawfully discriminated.[263] Like the First Circuit, the Second Circuit views this as "clarif[ying]" the *McDonnell Douglas* framework because all *Hicks* did was reiterate the longstanding rule that the plaintiff always bears the ultimate burden of persuasion despite *McDonnell Douglas*'s shifting burdens.[264] The Second Circuit also sees *Hicks* as holding that, after the employer satisfies its burden of production, the *McDonnell Douglas* presumption is no longer relevant and, at the third stage, the plaintiff *may* satisfy its burden of persuasion with the proof constituting the prima facie case and the evidence that the employer's proffered reasons are false.[265] This evidence must still be sufficient for the trier of fact to find that the plaintiff has proven its explanation of discriminatory intent by a fair preponderance of the evidence.[266]

The Third Circuit has yet to apply *Hicks*. It did state in a footnote, however, that proof of pretext alone is not necessarily sufficient to meet the plaintiff's burden of persuasion because the plaintiff retains the ultimate burden of proving that discrimination caused the employer's adverse action, citing *Hicks*.[267]

The Fourth Circuit has applied *Hicks*, but not just to

employment discrimination cases. In an age discrimination case, the appeals court used *Hicks* to establish that the employer's articulation of a nondiscriminatory reason for its employment action causes the presumption created by the plaintiff's prima facie case to "drop[] from the case," and the plaintiff bears the ultimate burden of proving the employer intentionally discriminated against the plaintiff.[268] On another occasion, the Fourth Circuit applied *Hicks* in a criminal case.

In a cocaine conspiracy prosecution, the court used *McDonnell Douglas*'s three-step framework to determine whether the prosecution used a peremptory challenge in a racially discriminatory manner.[269] Similar to disparate treatment cases, the criminal defendant's establishment of a prima facie case merely shifts to the prosecution the burden of producing a race-neutral explanation for the use of its peremptory strike.[270] If the prosecution satisfies its burden, the court should give the criminal defendant the chance to establish pretext.[271] In discussing pretext, the Fourth Circuit stated that

> [i]t is clear, in light of [*Hicks*], that this final step is but a part of the larger inquiry by the court into whether the defendant has advanced evidence that meets its burden of proving that the prosecutor's strike was animated by a prohibited motivation. As in *Hicks*, simply showing that the reasons advanced are

> pretextual does not automatically compel a finding of intentional discrimination (although under the proper facts such a showing can be sufficient). Instead, the inquiry always remains the same: the challenging party (here, the defendant) must show, through all relevant circumstances, that the prosecutor intentionally exercised [the] strike because of racial concerns.[272]

The Fourth Circuit affirmed the district court's finding overruling the defendant's objection because the reasons given by the prosecution for the peremptory strike were nondiscriminatory and the defendant did not otherwise produce evidence that race motivated the use of the peremptory strike.[273]

For the Fifth Circuit, *Hicks* "reaffirm[s] and clarifie[s]" the *McDonnell Douglas* framework.[274] It says *Hicks* holds that pretext, particularly if accompanied by suspicion that the employer is being mendacious, together with proof of the plaintiff's prima facie case, permits the factfinder to infer, and thus find, the ultimate fact of intentional discrimination.[275] Pretext does not compel judgment for the plaintiff, however, because the plaintiff retains at all times the ultimate burden of persuading the factfinder that unlawful discrimination was the cause of the complained of employment action.[276] When faced with a summary judgment motion, the plaintiff must produce sufficient evidence establishing that the employer's reason was pretext for

unlawful discrimination or the court will award judgment to the employer.[277]

The Seventh Circuit also views *Hicks* as "clarif[ying]" the *McDonnell Douglas* burden shifting framework.[278] In that circuit, *Hicks* means that once the employer offers a legitimate non-discriminatory reason for its employment action, the *McDonnell Douglas* framework "'simply drops out of the picture.'"[279] The plaintiff must then demonstrate that the employer's proffered reason was pretextual and ultimately that the employer's real reason for its action was discriminatory.[280] The plaintiff may show this with direct evidence of discrimination or indirect evidence "'showing that the employer's proffered explanation is unworthy of credence.'"[281] In either case, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer discriminated because of some illegitimate concern.[282] "Thus showing pretext alone is not sufficient for the plaintiff to carry the day," though it may support an inference of the ultimate fact of discrimination.[283] As stated more directly by one of the circuit's panels:

> [T]he holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for her discharge are false. The . . . plaintiff may prevail, not

automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances.[284]

Like the First and Fifth Circuits,[285] the Ninth and Tenth Circuits interpreted *Hicks* in the context of a motion for summary judgment.[286] In the Ninth Circuit, if a Title VII plaintiff successfully raises a factual issue regarding the credibility of the employer's proffered reason for its employment action, summary judgment is inappropriate because it is for the factfinder to decide which story to believe.[287] The Ninth Circuit believes this approach accords with *Hicks* because showing that the employer's proffered reason is pretextual does not compel a finding of unlawful discrimination.[288] Instead, because the factfinder may infer discrimination from the plaintiff's showing of pretext along with proof of the plaintiff's prima facie case, there will always be a question of fact.[289] The Tenth Circuit cited *Hicks* just to establish that, at the third stage, the plaintiff can prevail with direct evidence of discrimination or indirect evidence that the employer's proffered reason is pretext for unlawful discrimination.[290] Because the plaintiff in the Tenth Circuit's case provided only an unsupported assertion that her termination was pretext for sexual discrimination, the district court properly granted that part of the employer's summary judgment motion.[291]

Finally, on remand of *Hicks* from the Supreme Court, the Eighth Circuit had its opportunity to comment on the case.[292] The Eighth Circuit noted that the Supreme Court rejected its "pretext-only" rule that disbelief of the employer's proffered reason for its employment action compels judgment for the plaintiff.[293] It also noted that the Supreme Court reversed the Eighth Circuit's decision because the appellate court disregarded the principle of Federal Rule of Evidence 301 that a presumption does not shift the burden of proof to the opposing party and ignored the Supreme Court's prior admonitions that the Title VII plaintiff retains at all times the burden of persuading the factfinder that the employer intentionally discriminated.[294] The Eighth Circuit, however, seemingly took some solace from the Supreme Court's statement that disbelief of the employer's proffered reasons coupled with proof of the plaintiff's prima facie case permits the factfinder to infer the ultimate fact of intentional discrimination without any additional proof.[295] The Eighth Circuit then remanded the case to the District Court for further consideration in light of the Supreme Court's opinion.[296]

The Eighth Circuit's solace is not a rationalization for the Supreme Court's reversal. Instead, the collective opinion of the circuits supports the Eighth Circuit's assessment of *Hicks*. While it is clear the Supreme Court rejected a strict "pretext-only" rule that would mandate judgment for the plaintiff on a mere showing of pretext,[297] the circuits view *Hicks* as adopting a

version of that rule that permits, but does not compel, an inference of discrimination on the basis of pretext when combined with the elements of the plaintiff's prima facie case.[298]

E. The Congressional Response To Hicks

Several members of Congress did not receive *Hicks* as favorably as did the circuit courts of appeals. On November 22, 1993, they introduced a bill entitled the "Civil Rights Standards Restoration Act" in both Houses of Congress.[299] It has two purposes. The first purpose is to "restore" the *McDonnell Douglas-Burdine* standards regarding the effect of a finding of pretext in proving intentional discrimination that the bill's sponsors believe were "abandoned" by the Supreme Court in *Hicks*. The bill's second purpose is to ensure the application of the "restored" standards in all employment discrimination cases under federal law.[300] Specifically the bill provides that, at the third stage of the *McDonnell Douglas-Burdine* framework, the plaintiff establishes unlawful intentional discrimination when the plaintiff proves, by a preponderance of the evidence, that a discriminatory reason more likely motivated the employer or the employer's proffered explanation is unworthy of credence.[301] This provision mimics the language from *Burdine* that Justice Souter relies on in his *Hicks* dissent.[302]

The bills are currently pending before the Senate Committee

on Labor and Human Resources,[303] the House Committee on Education and Labor, and the House Judiciary Committee.[304] Enactment of either bill is not expected, however.[305]

VI. A Proposal For Clarifying And Reinforcing Disparate Treatment Analysis After *Hicks*

Despite general agreement by the circuit courts of appeals, *Hicks* still has the potential for causing confusion considering the rancor between the majority and dissenting opinions coupled with the pending bills in Congress. To the extent *Hicks* causes confusion, it certainly will not be the first time the Supreme Court has spawned uncertainty in the Title VII area. In *Furnco*, the nature of the employer's burden under *McDonnell Douglas* became confused.[306] The Supreme Court attempted to resolve this problem in *Sweeney* and failed.[307] In *Burdine*, the Court succeeded in defining the nature of the employer's burden as merely one of production.[308] Then, after *Aikens* admonished the courts to focus on the ultimate factual issue of intentional discrimination by the employer against an individual on the basis of a protected classification,[309] the Court turned around in *Price Waterhouse* and carved out a legal exception to *McDonnell Douglas-Burdine* for "mixed motive" cases that shifts the burden of persuasion to the employer.[310] *Hicks* may need further clarification and reinforcement to avoid a similar fate.

In *Hicks*, the battleground became the *Burdine* dictum that the Title VII plaintiff can demonstrate pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence."[311] This dictum preoccupied Justice Souter's dissent.[312] Justice Scalia's majority opinion became consumed with defending against this argument.[313] The resulting sloppy and potentially confusing language follows in the tradition of *Furnco* and *Sweeney* by creating at least as many questions as it answers.[314] Stated another way, the *McDonnell-Douglas-Burdine* framework is a ship without an anchor. Anchoring it in the congressionally-enacted Federal Rule of Evidence 301 will clarify and reinforce disparate treatment analysis.

A. Disparate Treatment Analysis: A Proposed Clarification

The confusion and uncertainty created by the Supreme Court's Title VII precedents have weakened the ship that is disparate treatment analysis. Their effects can be dissipated and the ship's structure reinforced if the *McDonnell Douglas-Burdine* framework is recast in the following manner:

1. The Plaintiff's Prima Facie Case.—At the first stage of disparate treatment analysis, the Title VII plaintiff must prove by a preponderance of the evidence a prima facie case of employment discrimination. The plaintiff may establish this prima facie case by showing, generally speaking, that:

(a) The plaintiff belongs to a class protected by Title VII;

(b) An employer denied the plaintiff an employment opportunity;

(c) The plaintiff was qualified for the employment opportunity denied by the employer; and

(d) The employer sought or chose others for this employment opportunity from among persons of the plaintiff's qualifications who were outside of the plaintiff's protected class.

These elements will vary depending on the factual situation.

If proved by the plaintiff, the prima facie case establishes a presumption that the employer intentionally discriminated against the plaintiff on a basis prohibited by Title VII. If the plaintiff fails to prove the prima facie case, the court may direct a verdict for the employer as a matter of law.

2. The Employer's Burden of Production.—The effect of the presumption established by the prima facie case is to shift to the employer a burden of production, the second stage of the

analysis. At this stage, the employer can satisfy its burden of production by articulating some legitimate, nondiscriminatory reason for the adverse employment action through the introduction of admissible evidence. The evidence introduced must be sufficient to support—though not necessarily compel—a finding that the presumed fact of intentional discrimination does not exist. In other words, it is sufficient if the employer's evidence, if true, would raise a genuine issue of fact about whether it discriminated against the plaintiff.

If the employer does not produce evidence of a legitimate, nondiscriminatory reason for its action, the presumption survives and may entitle the plaintiff to judgment as a matter of law. If the employer does produce such evidence, the presumption of intentional discrimination is extinguished and the case goes to the factfinder. Although the presumption of discrimination is extinguished by the employer's satisfaction of its burden, any factual inference of intentional discrimination generated by the plaintiff's prima facie case survives and the factfinder may consider the inference during deliberations on findings.

3. The Plaintiff's Burden of Proving Pretext.—If the employer satisfies its burden of production, the analysis moves to the third and final stage. At this final stage, the plaintiff must prove by a preponderance of the evidence that the reasons proffered by the employer were not its true reasons but were a

pretext for the kind of discrimination prohibited by Title VII. There is no limit on the type of evidence the plaintiff may present on the issue of pretext.

The plaintiff may attempt to satisfy its final burden in one of two ways. The plaintiff can prove pretext directly by showing that discrimination more likely motivated the employer's action or indirectly by showing that the employer's proffered reason is not a credible nondiscriminatory explanation for its action. Indirect proof may be made by proving pretext alone, particularly if accompanied by a suspicion of mendacity, together with the elements of the prima facie case. It is not necessary for the plaintiff to produce any additional evidence or root out any other possible reasons for the adverse employment action not reasonably raised by the evidence. The ultimate burden of persuading the factfinder that the employer intentionally discriminated against the plaintiff on a prohibited basis remains with the plaintiff at all times.

B. Federal Rule of Evidence 301: An Anchor for Disparate Treatment Analysis

The ship is recast. Without an anchor to hold it securely in place and in stable condition, however, the ship is likely to drift as it has in the past. The anchor is Federal Rule of Evidence 301. When anchored to this rule, it is easier to

understand *McDonnell Douglas-Burdine*, simpler to apply in practice, and stable as a theory.

1. The Rule.—Federal Rule of Evidence 301 provides that:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

This rule embodies the Thayer or "bursting bubble" theory of presumptions.[315] It is called the "bursting bubble" theory because the presumption is spent and disappears once the party opposing the presumption produces sufficient evidence to warrant a finding of the nonexistence of the presumed fact.[316]

2. The Law of Presumptions in Brief.—In general, a presumption is a procedural rule that requires the existence of one fact to be presumed when a party establishes another fact unless and until the fulfillment of a certain specified condition.[317] The specified condition concerns how the party's opponent will prove facts contrary to the presumed fact.[318] In

the absence of the required proof from the opponent, the factfinder must find for the party that established the presumption.[319]

Under Professor Thayer's theory, the legal effect of a presumption is to shift to the opponent the burden of producing evidence that would support, but not necessarily compel, a finding that the presumed fact does not exist.[320] If the opponent produces that evidence, the presumption disappears and the factfinder decides the case as though there never was a presumption.[321] In practical terms, this means that the presumption permits the party that established the presumed fact to survive a motion for a directed verdict at the close of its case.[322] The presumption has no other value at trial.[323] Any inference derived from the presumed fact, however, may remain.[324]

3. Presumptions and Rule 301's Legislative History.—The proposed Federal Rules of Evidence originally prescribed by the Supreme Court and submitted to Congress in 1972[325] rejected the Thayer theory because, in the Court's view, it accorded presumptions too "slight and evanescent" an effect.[326] Instead, the Court adopted a rule based on a theory attributed to Professor Morgan.[327] This theory contends that a presumption should have the effect of shifting not only the burden of producing evidence but also the burden of persuasion to the opponent.[328] Under this theory, the presumed fact *must* be found

once the basic fact is established unless the opponent persuades the factfinder that the presumed fact does not exist.[329] The proposed Rule 301 provided that "a presumption imposes on the party against whom it is directed, the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[330] By way of example, *Price Waterhouse* is a Morgan theory decision because it shifted the burden of persuasion to the employer once the plaintiff established a prima facie case.[331]

Both Houses of Congress rejected the Supreme Court's proposed Rule 301. The House of Representatives adopted an "intermediate" position that was neither Morgan theory nor Thayer theory; instead, it treated presumptions as evidence.[332] The Senate proposed a Thayer theory rule[333] that the Conference Committee eventually accepted and the Congress enacted.[334]

In the congressional debates and the legislative history on Rule 301, there is no suggestion that the rule would not apply to Title VII or that Title VII provided a different treatment of presumptions.[335] The Supreme Court expressly accepted the legislative modification of Rule 301, noting that "Congress . . . has plenary authority over the promulgation of evidentiary rules for the federal courts."[336] Nevertheless, the Court scarcely mentions Rule 301 in its Title VII opinions and does not analyze the disparate treatment analytical framework in light of the rule when the rule is cited. This omission is understandable in

McDonnell Douglas because the decision pre-dates the enactment of the Federal Rules of Evidence.[337] Rule 301's omission from post-enactment opinions is less understandable. *Burdine* relegates Rule 301 to a footnote that cites it, with an introductory signal, as a supplemental authority for the function of a presumption.[338] *Hicks* cites the rule often enough, but just to support a proposition previously established by other authorities.[339] Other Title VII decisions do not mention Rule 301 at all.[340] This is unfortunate because evidence scholars have recognized that the *McDonnell Douglas-Burdine* framework is faithful to Rule 301 and the Thayer theory of presumptions.[341] More importantly, applying Rule 301 clause by clause to the *McDonnell Douglas-Burdine* framework would provide a clearer understanding of disparate treatment analysis.

4. Application of Rule 301 to Disparate Treatment Analysis.—The first clause of Rule 301 states that the rule applies in all civil cases unless otherwise provided for by Congress.[342] Title VII plainly provides a civil cause of action.[343] Congress has not legislated further or "otherwise provided" for the Title VII parties' respective burdens.[344] Rule 301, therefore, applies to cases of disparate treatment employment discrimination under Title VII.

Rule 301's next two clauses state that "a presumption imposes on the party against whom it is directed the burden of

going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion . . . ." These clauses encompass the first two steps of the proposed clarification of the *McDonnell Douglas-Burdine* framework.

First, under *McDonnell Douglas-Burdine*, the plaintiff's establishment of the prima facie case creates the Rule 301 presumption that the employer discriminated in violation of Title VII.[345] The plaintiff establishes a prima facie case when the plaintiff proves by a preponderance of the evidence four elements, which elements can vary depending on differing factual circumstances.[346]

As explained in *Hicks*, establishing a presumption means the finding of a "predicate fact," that is to say, the prima facie case.[347] The finding of the "predicate fact" requires the conclusion that the employer unlawfully discriminated in the absence of an explanation by the employer.[348] If the plaintiff does not prove a prima facie case, however, there may be a directed verdict for the employer as a matter of law.[349] Understood in that light, *McDonnell Douglas-Burdine* is consistent with the generally accepted understanding embodied in Rule 301. The understanding is that a presumption is a procedural rule that requires the existence of one fact to be presumed upon the establishment of another fact by a party unless and until the

fulfillment of a certain specified condition.[350]

Second, under both *McDonnell Douglas-Burdine* and Rule 301, establishing the presumption shifts to the opposing party the burden of going forward with evidence of a legitimate explanation for its action to meet the presumption. The burden shifted is a burden of *production*, however, *not* a burden of *persuasion*.[351] Because this burden is merely one of production, the admissible evidence introduced by the opposing party need only be sufficient to support, not necessarily compel, a finding that the presumed fact does not exist. In other words, it is sufficient if the employer's evidence, if true, would raise a genuine issue of fact about whether it discriminated against the plaintiff.[352]

The employer's success or failure in satisfying this relatively slight burden determines whether the case will continue under both *McDonnell Douglas-Burdine* and Rule 301. If the employer does not produce evidence of a nondiscriminatory reason for its action, the presumption continues and may entitle the plaintiff to judgment as a matter of law.[353] If the employer does produce such evidence, the presumption of intentional discrimination is extinguished and the case goes to the factfinder.[354] As noted by the commentators and the *Hicks* majority, any factual inference of intentional discrimination produced by the plaintiff's prima facie case survives the extinguishment of the presumption and the factfinder may consider

the inference during deliberations on findings.[355]

Rule 301's final clause explains that the burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." This clause encompasses the last step of the proposed clarification of the *McDonnell Douglas-Burdine* framework. If the employer satisfies its burden of production, the plaintiff must prove by a preponderance of the evidence that the reasons proffered by the employer were not its true reasons but were a pretext for the kind of discrimination prohibited by Title VII.[356] The plaintiff must have this opportunity because the burden of persuasion remains with the plaintiff throughout the trial under both Rule 301 and *McDonnell Douglas-Burdine*.[357] Title VII does not limit the plaintiff to presenting evidence of a certain type on the issue of pretext; instead, the evidence the plaintiff can present may take a variety of forms.[358] The question that remains concerns what the plaintiff must prove with that evidence.

Rule 301's requirement that the burden of persuasion remains with the party "on whom it was originally cast" begs the question: What must that party prove? Justice Scalia and the *Hicks* majority believed the plaintiff must prove pretext for the sort of discrimination prohibited by Title VII at the last stage of the *McDonnell Douglas-Burdine* analysis.[359] Justice Souter and the *Hicks* dissenters believed the plaintiff need prove pretext

only.[360] But, as both sides would agree, what is "originally cast" on the Title VII plaintiff is the burden to prove, at the least, a prima facie case of prohibited discrimination.[361] This "originally cast" burden is consistent with *McDonnell Douglas-Burdine* and Title VII, properly understood.

The battleground *Burdine* language, that the plaintiff prevails by showing the employer's explanation is unworthy of belief,[362] can only be understood in the context of the *McDonnell Douglas* language from which it is drawn.[363] In *McDonnell Douglas*, the Supreme Court gave examples of the types of relevant evidence that would satisfy the plaintiff's burden of showing pretext.[364] Each example described discriminatory behavior of the kind prohibited by Title VII. Subsequent *McDonnell Douglas* language confirmed the discriminatory nature of the examples given. This language stated that the plaintiff must show the employer's stated reasons are really a cover-up for prohibited discrimination.[365]

Statutorily, this must also be the case. Title VII, by its terms, merely prohibits discrimination in employment decisions based upon certain impermissible classifications.[366] Its objective is plain from the statute. "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[367] Nevertheless,

"[d]iscriminatory preference for any group, minority or majority, is precisely and *only* what Congress has prescribed."[368] "When the words of a statute are unambiguous . . . 'judicial inquiry is complete.'"[369] Title VII, therefore, makes it an unlawful employment practice for employers to discriminate on the basis of prohibited classifications. It does not make being untruthful, alone, an unlawful employment practice.

It is for these reasons that the third and final step of the clarified disparate treatment analysis can require the plaintiff to prove pretext directly by showing that discrimination more likely motivated the employer's action or, in the more usual case, indirectly by showing that the employer's proffered reason is not a credible *nondiscriminatory* explanation for its action.[370] This is not an insurmountable burden because, as the *Hicks* majority stated, the plaintiff may prove intentional discrimination by showing pretext alone together with the elements of the prima facie case, particularly if a suspicion of mendacity accompanies pretext.[371] In many cases the plaintiff will not need to produce additional evidence[372] or root out any other possible reasons for the adverse employment action not reasonably raised by the evidence to prove discrimination; the surviving inference and facts will support the plaintiff's case. This should satisfy Justice Souter's concern that the *Hicks* majority unfairly required the Title VII plaintiff to produce direct evidence of discrimination to counter all possible

nondiscriminatory reasons, even if unarticulated.[373]

5. Jury Instructions and Rule 301.—With the advent of jury trials for plaintiffs seeking compensatory or punitive damages for intentional discrimination under Title VII,[374] instructions could become an issue. They should not, however, because no special instructions are necessary under Rule 301 and the Thayer theory it embodies.[375] This stands in stark contrast to Professor Morgan's approach. With its shifting burdens of persuasion,[376] the Morgan theory adds complexity to any case.[377]

Rule 301 does not state how to instruct a jury when the opponent meets the presumption and it disappears.[378] Most commentators agree, however, that the extinguished presumption should not be mentioned to the jury.[379] In addition, no rule of law or special jury instruction would aid in drawing the inference that survives the extinguished presumption; the jury simply weighs the evidence.[380] Thus, anchoring disparate treatment analysis to Rule 301 has the added virtue of making the trial judge's job easy.[381]

6. Application of the Proposed Disparate Treatment Analysis.—The greatest value of the clarified disparate treatment analysis is that it produces fair results. It is in this area that the greatest contrast exists between the proposed clarification and the position taken by the *Hicks* dissent and its

supporters.

In his *Hicks* dissent, Justice Souter championed the "pretext-only" rule because he believed *Burdine* dictates it[382] and the *Hicks* majority unfairly required Title VII plaintiffs to produce direct evidence of discrimination to counter all possible nondiscriminatory reasons, even unarticulated ones.[383] Several members of Congress agreed and submitted bills that would "restore" the "pretext-only" rule to disparate treatment analysis.[384] *Burdine*, however, does not dictate the "pretext-only" rule,[385] and *Hicks* does not require plaintiffs to attack all possible reasons for the employer's action not reasonably raised by the evidence to prevail, as the circuit courts of appeals have demonstrated.[386] More importantly, applying Justice Souter's principles to a given Title VII complaint instead of the proposed clarification could unjustly punish employers who do not discriminate. Applying the "pretext-only" rule and the proposed clarification to the facts in *Hicks* illustrates this point.

The Eighth Circuit and the district court agreed that Hicks established a prima facie case of racial discrimination and the explanation proffered by St. Mary's, that the severity and accumulation of violations committed by Hicks justified his discharge, articulated a legitimate, nondiscriminatory reason for its action.[387] As with most intentional discrimination complaints, the issue in *Hicks* came down to the final stage of

the disparate treatment analysis.[388] At that stage, both courts agreed that St. Mary's proffered reason was pretextual.[389] The results may differ, however, depending on whether the "pretext-only" rule or the proposed clarification is applied.

Applying the "pretext-only" rule, the Eighth Circuit believed that the plaintiff may prevail by merely showing that the employer's explanation was pretextual.[390] Because the district court found the explanation proffered by St. Mary's was pretextual, the appellate court's analysis was complete and it reversed the district court.[391] Instead of leaving well enough alone, however, the Eighth Circuit proceeded to criticize the district court's conclusion that the honor center's actions were "personally motivated" because St. Mary's never stated that personal motivation was its reason.[392]

The Eighth Circuit's application of the "pretext-only" rule demonstrates how unfair the rule can be. In dismissing personal motivation as a reason because it was not stated, the appellate court in effect conceded the possibility that St. Mary's actions were not discriminatory. By employing the "pretext-only" rule, however, the Eighth Circuit foreclosed the possibility that the employer's actions did not violate Title VII. The clarified disparate treatment analysis would not foreclose that possibility. Applying the clarification to the facts in *Hicks*, the trier of fact *may* reach one of two possible findings. One is

a finding of discrimination based upon the plaintiff's establishment of the prima facie case and pretext. The other is a finding of no discrimination because personal motivation is not a prohibited by Title VII. In either instance, the system works because it fairly considers all possible outcomes. Applying the "pretext-only" rule, the nondiscriminatory basis is not considered even though the evidence reasonably raises that possibility. This exposes the employer to liability even though its action may not violate Title VII. It cannot be said in that instance that the system works fairly.

VII. Conclusion

Invidious discrimination remains a fact of life in this country. Its existence foments suspicion and contempt between peoples, generates despair and resentment in the oppressed, and retards the advancement of individuals to the detriment of society. For these reasons it is rightly condemned. Laws such as Title VII reflect this condemnation. Because of such laws, or hopefully in spite of them, social attitudes have changed to the point where employers rarely act for discriminatory reasons or, more likely, disguise pernicious conduct out of fear of the consequences. The overt act of discrimination is easy to recognize. The veiled act of discrimination is difficult to discern, much less prove. The courts have recognized the difficulty of proof in these instances and have been diligent in

developing the framework for ferreting out such detestable conduct. In the zeal of some to right these wrongs and punish the bigoted, however, the swath is sometimes cut too wide, taking with it employers who have done no wrong.

The "pretext-only" rule in disparate treatment cases was a swath that was cut too wide. Proposed legislation that seeks to revive the rule should rightly die in committee. Discarding the "pretext-only" rule, though, must not appear to signal a return to the time when possible victims of employment discrimination had no recourse for their complaints. This thesis's proposed clarification of disparate treatment analysis tries to be faithful to that concern while being mindful that Title VII's only purpose is to combat invidious discrimination by employers. For that reason, the "pretext-only" rule wrongly punished employers with a finding of discrimination for actions that are the result of mistake, embarrassment, or some other practice that is not discriminatory. Anchoring the proposed clarification in an accepted rule of evidence avoids that problem as well as the confusion that has plagued disparate treatment analysis over the years. This maintains the rightful focus of Title VII on the issue of discrimination while retaining fairness to both parties. In addition, the stability this brings to employment discrimination law is important in this new era of jury trials and damages for Title VII complaints, considering its promise of increased litigation. What should be of even greater importance,

however, is the hope for justice for all parties in at least one area of social intercourse.

ENDNOTES

1. Brown v. General Services Administration, 425 U.S. 820, 835 (1976).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

3. H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2516; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

4. 42 U.S.C. § 2000e-2(a)(1).

5. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-336 n.15 (1977); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286 (2d ed. 1983). Two other employment discrimination theories frequently raised are employer policies or practices which perpetuate in the present the effects of past discrimination, *see Teamsters*, *supra* (holding bona fide seniority systems which are applied equally to all do not violate Title VII), and failure to make reasonable accommodation to an employee's religious observance or practices, *see* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding employer must "reasonably accommodate" employee's religious needs when they do not pose "undue hardship" to the conduct of the employer's business). *See generally* SCHLEI & GROSSMAN, *supra*, at

1, 23-79, 206-45 (discussing the application of these alternatives theories).

6. *Teamsters*, 431 U.S. at 335 n.15; SCHLEI & GROSSMAN, *supra* note 5, at 1286-87. As stated by the Supreme Court in *Griggs*, the seminal disparate impact case:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

401 U.S. at 432.

7. *Teamsters*, 431 U.S. at 335 n.15; SCHLEI & GROSSMAN, *supra* note 5, at 1286.

8. 411 U.S. 792 (1973).

9. 450 U.S. 248 (1981). A shorthand term used for the analytical framework described by these two cases is *McDonnell Douglas-Burdine*. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (David A. Cathcart ed., 2d ed. Supp. 1983-85).

10. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53.

11. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253-54.

12. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 253.

13. *Burdine*, 450 U.S. at 253.

14. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 203 (1993); Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1107 (1991).

15. *See infra* note 128.

16. *See infra* note 129.

17. 113 S. Ct. 2742 (1993).

18. Dick Lehr, *High Court Backs Off Race-Based Preferences*, BOSTON GLOBE, July 11, 1993, at 1; Joan Biskupic, *Court's*

Conservatism Unlikely to be Shifted by a New Justice, WASH. POST, June 30, 1993, at A1.

19. *Id.* at 2756-66 (Souter, J., dissenting).

20. *Id.* at 2749-51.

21. SCHLEI & GROSSMAN, *supra* note 5, at 1291-92.

22. Catherine A. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 67 (1991) ("Most disparate treatment cases are won or lost on the issue of pretext.") (footnote omitted); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10 (N. Thompson Powers ed., 2d ed. Supp. 1987-89) ("The vast majority of disparate treatment cases . . . turn on the issue of pretext . . . ."); Hannah A. Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 357-58 (1984) ("[D]isparate treatment cases are won or lost on the pretext issue, unless defendants are unable to produce any evidence of a legitimate reason for their behavior . . . .") (footnotes omitted).

23. 113 S. Ct. at 2756-57, 2761, 2764.

24. *Id.* at 2750.

25. *See infra* notes 37-126, 204-53 and accompanying text.

26. S. REP. NO. 872, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2368.

27. 42 U.S.C. §§ 2000e to 2000e-17; Morton v. Mancari, 417 U.S. 535, 545 (1974).

28. *Id.* § 2000e-2(a). *See also* 42 U.S.C. §§ 2000e-2(b)-(d) which applies similar language to employment agencies and labor organizations. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988), also prohibits discrimination in employment decisions against individuals who are age forty to seventy. *Id.* § 623.

29. 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey) ("What this bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

30. H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

31. 42 U.S.C. §§ 2000e-4(a), 2000e-5(a) and (b); H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. This thesis will refer to the Commission hereinafter as the EEOC.

32. County of Washington v. Gunther, 452 U.S. 161, 178 (1981) (citing S. REP. NO. 867, 88th Cong., 2d Sess. 12 (1964)); *Teamsters*, 431 U.S. at 381 (Marshall, J., concurring in part and dissenting in part).

33. 42 U.S.C. § 2000e(b)-(e).

34. *Id.* § 2000e-2(a)-(d).

35. *Id.* § 2000e-2(a)(1).

36. *Id.* *See generally* SCHLEI & GROSSMAN, *supra* note 5, at 1-2. For ADEA plaintiffs, the requirements are essentially the same. Hodgson v. First Federal Savings & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972).

37. *Teamsters*, 431 U.S. at 335 n.15; SCHLEI & GROSSMAN, *supra* note 5, at 1286.

38. *Teamsters*, 431 U.S. at 335 n.15. "Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it created Title VII." *Id.* (citing 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey)).

39. SCHLEI & GROSSMAN, *supra* note 5, at 1286.

40. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983); SCHLEI & GROSSMAN, *supra* note 5, at 1291.

41. SCHLEI & GROSSMAN, *supra* note 5, at 1291. *See also Aikens*, 460 U.S. at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by . . . circumstantial evidence."); *Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical [in disparate treatment cases], although it can in some situations be inferred from the mere fact of differences in treatment.").

42. SCHLEI & GROSSMAN, *supra* note 5, at 1292. Disparate treatment analysis also applies to age discrimination claims under the ADEA, 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 301-62 (1993) [hereinafter WEINSTEIN & BERGER], claims under §§ 1981 and 1983 of the Civil Rights Act of 1964, *id.* at 301-63, actions for unlawful retaliation under 42 U.S.C. § 2000e-3(a), *id.*, and class actions alleging a "pattern or practice" of

intentional discrimination, *Teamsters*, 431 U.S. at 335. *McDonnell Douglas* does not apply, however, where the plaintiff presents direct evidence of discrimination. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

43. 411 U.S. 792 (1973).

44. *McDonnell Douglas*, 411 U.S. at 794-96.

45. 42 U.S.C. § 2000e-2(a)(1).

46. *Id.* § 2000e-3(a).

47. *McDonnell Douglas*, 411 U.S. at 796.

48. *Id.* at 797.

49. Section 704(a) provides in pertinent part that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

42 U.S.C. § 2000e-3(a).

50. *McDonnell Douglas*, 411 U.S. at 797.

51. *See supra* text accompanying note 28.

52. *McDonnell Douglas*, 411 U.S. at 797.

53. *Id.*

54. *Id.* at 797-98.

55. *Id.*

56. *Id.*

57. *Id.* at 800.

58. *Id.* at 801.

59. *Id.* at 802.

60. *Id.* at 802 n.13.

61. *Id.* at 802.

62. *Id.* at 804-05.

63. *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

64. *Teamsters*, 431 U.S. at 358.

65. *Id.*

> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

Id. at 358 n.44.

66. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

67. Sullivan, *supra* note 14, at 1115.

68. *Burdine*, 450 U.S. at 253.

69. *McDonnell Douglas*, 411 U.S. at 802.

70. 438 U.S. 567 (1978).

71. *Id.* at 569-72.

72. *See supra* note 6 and accompanying text.

73. *Id.* at 572-73.

74. *Id.* at 573-74.

75. *Id.* at 574.

76. *Id.* at 575.

77. *Id.* at 576-80.

78. *Id.* at 576.

79. *Id.* at 577-78 (emphasis added) (quoting *McDonnell Douglas*, 411 U.S. at 802).

80. Dean C. Berry, *The Changing Face of Disparate Impact Analysis*, 125 MIL. L. REV. 1, 8 (1989).

81. 439 U.S. 24 (1978) (per curiam).

82. *Id.* at 24 (emphasis added).

83. *Id.* at 25 (emphasis added).

84. *Id.* at 24 n.1.

85. *Id.* at 27-28 (Stevens, J., dissenting).

86. 450 U.S. 248 (1981).

87. *Id.* at 250-51.

88. *Id.* at 251.

89. *Id.* at 251-52.

90. *Id.* at 252.

91. *Id.* at 250.

92. *Id.* at 254.

93. *Id.* at 254-55 (citation and footnote omitted).

94. *Id.* at 255; *see also id.* at 260 ("[T]he defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.").

95. *Id.* at 252-53. In *McDonnell Douglas*, the Supreme Court did not state that the plaintiff's burden at the prima facie and pretext stages of its disparate treatment analysis was by a preponderance of the evidence. 411 U.S. at 802-04.

96. *Burdine*, 450 U.S. at 253. The Supreme Court also held that there was no requirement that the employer hire a minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. *Id.* at 258-59.

97. 460 U.S. 711 (1983).

98. *Id.* at 712-13.

99. *Id.* at 717.

100. *Id.*

101. *Id.* at 714 (quoting *Burdine*, 450 U.S. at 254).

102. *Id.* at 715.

103. *Id.* at 715 (citing *Burdine*, 450 U.S. at 253).

104. SCHLEI & GROSSMAN, *supra* note 9, at 304 (citing *Aikens*, 460 U.S. at 715).

105. *Id.* (citing *Aikens*, 460 U.S. at 715).

Whether the district courts base their rulings on the absence of a prima facie case or the ultimate issue of discriminatory intent is significant for standard of review purposes. The intent issue is a question of fact subject to the clearly erroneous rule. *Id.* at 304 n.52 (citing Pullman-Standard v. Swint, 456 U.S. 273 (1982)). The issue whether a prima facie case has been established is a question of law subject to *de novo* review. *Id.* (citing Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1130 (11th Cir. 1984); Gay v. Waiters' & Dairy Lunchmen's Local 30, 694 F.2d 531, 540 (9th Cir. 1982)).

106. 490 U.S. 228 (1989).

107. *Id.* at 231-36.

108. *Id.* at 236-37.

109. *Id.* at 237.

110. *Id.*

111. *Id.* at 232.

112. *Id.* at 242, 244-45, 252-53, 258.

113. *Id.*

114. *Id.* at 259-60 (White, J., concurring), 261 (O'Connor, J., concurring).

115. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254-55.

116. *Price Waterhouse*, 490 U.S. at 246 (stating employer's burden most appropriately deemed an "affirmative defense"); 260 (White, J., concurring) (stating "mixed-motives" cases are from cases such as *McDonnell Douglas* and *Burdine*); 272-73 (O'Connor, J., concurring) (stating departure from *McDonnell Douglas-Burdine* justified where plaintiff presents direct evidence of discrimination such that it is appropriate to require employer, which created uncertainty about causation, to show its decision was legitimate).

117. 491 U.S. 164 (1989).

118. *Id.* at 169.

119. At the time of *Patterson*, § 1981 provided as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

120. *Patterson*, 491 U.S. at 178-80.

121. *Id.* at 186.

122. *Id.* at 187 (citing *Burdine*, 450 U.S. at 256).

123. *Id.* at 170.

124. *Id.* at 187.

125. *Id.* at 188.

126. *Id.*

127. McGinley, *supra* note 14, at 203; Sullivan, *supra* note 14, at 1107.

128. Equal Employment Opportunities Comm'n v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (holding Title VII is limited to territorial jurisdiction of the United States); West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) (holding the definition of attorney's fees does not include expert witness fees); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding 42 U.S.C. § 1981 applies only to racial discrimination in contract formation, not post-hiring job-related racial discrimination); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (holding the adoption of the allegedly discriminatory seniority rule begins the period for challenging the rule, not when the rule affects the employee); Martin v. Wilks, 490 U.S. 755 (1989) (holding white firefighters may challenge consent decree years after it received court approval); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding disparate impact plaintiff has the burden of establishing lack of "business necessity" and identifying the discriminatory practice with specificity); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding the employer can avoid liability if it demonstrates the

same employment action would have been taken in the absence of discrimination ("mixed motive" cases)).

129. Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of 29 U.S.C. and 42 U.S.C.) [hereinafter 1991 Act]. *See* 1 WEINSTEIN & BERGER, *supra* note 42, at 301-61 ("Congress, reacting to the significantly greater burdens placed upon plaintiffs in civil rights cases by the Supreme Court . . . enacted the Civil Rights Act of 1991); David J. Shaffer, *The Civil Rights Act of 1991: Expansion of Remedies for Employment Discrimination*, FED. B. NEWS & J., Jan. 1992, at 100, 100 ("[T]he main impetus for passage of the [Civil Rights Act of 1991] was a series of Supreme Court decisions restricting remedies in discrimination cases . . . ."); *Civil Rights Act of 1991*, 9 Employee Rel. Wkly. (BNA) No. 44, at S-1 (Special Supp. Nov. 11, 1991) ("The primary impetus for the Civil Rights Act of 1991 was to overturn a series of 1989 U.S. Supreme Court holdings unfavorable to employment bias complainants. The act also reverses two 1991 decisions . . . .").

130. *See generally* Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1 (1993).

131. 1991 Act, *supra* note 129, § 102(a) (codified at 42 U.S.C. § 1981A(a)). Section 1981 is not available to U.S.

Government employees because Title VII is the exclusive judicial remedy for a federal employee complaining of employment discrimination. *Brown*, 425 U.S. at 835.

132. 1991 Act, *supra* note 129, § 102(a) (codified at 42 U.S.C. § 1981A(a)); *supra* note 6 and accompanying text.

133. 1991 Act, *supra* note 129, § 102(a) (citing 42 U.S.C. § 2000e-5(g)).

134. *Id.* at § 102; 42 U.S.C. § 1981.

135. 1991 Act, *supra* note 129, § 102(b)(1) (codified at 42 U.S.C. § 1981A(b)(1)).

136. *Id.* at § 102(b)(3) (codified at 42 U.S.C. § 1981A(b)(3)).

137. *Id.* at § 102(c) (codified at 42 U.S.C. § 1981A(c)).

138. Hernicz, *supra* note 130, at 4.

139. *Id.* (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966)); *see also supra* notes 30-31 and accompanying text.

140. Hernicz, *supra* note 130, at 4.

141. *See* 153 Daily Lab. Rep. (BNA) D-22 (Aug. 11, 1993) (reporting EEOC will receive record number of charges for fiscal year 1993 and resolving "more charges for more money than ever").

142. *See supra* notes 105-15 and accompanying text.

143. 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991) (statement of Sen. Dole), H9529 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards), H9547 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde).

144. 1991 Act, *supra* note 129, § 107(a) (codified at 42 U.S.C. § 2000e-2(m)), § 107(b)(3) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)).

145. *Id.* at § 107(b)(3) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)).

146. *Id.* at § 101 (codified at 42 U.S.C. § 1981(b)).

147. *See supra* text accompanying notes 116-25.

148. 1 WEINSTEIN & BERGER, *supra* note 42, at 301-62.

149. Miguel A. Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1153 (1980).

150. 113 S. Ct. 2742 (1993).

151. *Id.* at 2750.

152. Lanctot, *supra* note 22, at 81.

153. *Id.* at 87; *Hicks*, 113 S. Ct. at 2750 (citing EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1321 (10th Cir. 1992) (citing *Burdine*, 450 U.S. at 253); Samuels v. Raytheon Corp., 934 F.2d 388, 391-92 (1st Cir. 1991) (citing *Burdine*, 450 U.S. at 253); Holder v. City of Raleigh, 867 F.2d 823, 828-29 (4th Cir. 1989) (citing *Burdine*, 450 U.S. at 253); Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.) (citing *Burdine*, 450 U.S. at 253), *cert. denied*, 483 U.S. 1006 (1987)). *See also* Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 279, 282-83 (6th Cir. 1991) (opinion of Boggs, C.J.) ("proving that an employer's proffered reason for discharging an employee is a pretext does not establish that it is a pretext for racial discrimination") (citing *Burdine*, 450 U.S. at 253-54), *cert. denied*, 112 S. Ct. 1497 (1992); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 527-29 (11th Cir. 1983) (dictum) ("Only when defendants' articulated reason is

pretext 'for accomplishing a racially discriminatory purpose' will the plaintiff recover.") (quoting *Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir. 1982)).

154. Lanctot, *supra* note 22, at 65.

155. *Hicks*, 113 S. Ct. at 2750 (citing Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2nd Cir.) (citing *Burdine*, 450 U.S. at 256), *cert. denied*, 112 S. Ct. 228 (1991); MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988) (same); Tye v. Polaris Joint Vocational Sch. District Board of Educ., 811 F.2d 315, 319-20 (6th Cir.) (same), *cert. denied*, 484 U.S. 924 (1987); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (same); Thornburgh v. Columbus and Greenville R.R. Co., 760 F.2d 633, 639-40, 646-47 (5th Cir. 1985) (same); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395-96 (3rd Cir.) (same), *cert. denied*, 469 U.S. 1087 (1984)). *See also* Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (dictum) ("The plaintiff may satisfy th[e] burden [of showing pretext] by persuading the court . . . indirectly that the proffered reason for the [employment action] is not worthy of belief.") (citing *Burdine*, 450 U.S. at 256)).

156. *Burdine*, 450 U.S. at 253 (citing *McDonnell Douglas*, 411 U.S. at 804) (emphasis added)).

157. *See supra* note 153.

158. *Holder*, 867 F.2d at 828 (citing *Benzies*, 810 F.2d at 148).

159. *Flasher*, 986 F.2d at 1321; *Benzies*, 810 F.2d at 148.

160. *Holder*, 867 F.2d at 827-28 (quoting Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir. 1987)).

161. *Benzies*, 810 F.2d at 148.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Flasher*, 986 F.2d at 1321; *Benzies*, 810 F.2d at 148.

166. *Burdine*, 450 U.S. at 256.

167. *Id.* (emphasis added).

168. *See supra* note 155.

169. *Thornburgh*, 760 F.2d at 639-40 (citing *Furnco*, 438 U.S. at 577).

170. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244 (E.D. Mo. 1991).

171. *Id.* at 1245-46 n.1.

172. *Id.* at 1245.

173. *Id.*

174. *See supra* note 119.

175. *Hicks*, 756 F. Supp. at 1245.

176. *Id.*

177. *Id.* at 1246 and n.3.

178. *Id.* at 1246.

179. *Id.* at 1246-47, 1251.

180. *Id.* at 1247, 1251-52.

181. *Id.* at 1247.

182. *Id.* at 1247, 1251.

183. *Id.* at 1247-48 and n.3, 1251 n.17.

184. *Id.* at 1246 n.3, 1248 nn. 8, 12, 13, & 14.

185. *Id.* at 1249.

186. *Id.*

187. *Id.* at 1249-51.

188. *Id.* at 1251-52.

189. *Id.* at 1250.

190. *Id.* at 1250-51.

191. *Id.* at 1251.

192. *Id.* (citation omitted).

193. *Id.* at 1251-52.

194. *Id.* at 1252.

195. *Id.*

196. *Id.* For the same reasons, the court also rejected Hicks's § 1983 claim because the *McDonnell Douglas-Burdine* framework is applied when § 1983 is used as a parallel remedy with Title VII. *Id.* at 1253.

197. Hicks v. St. Mary's Honor Center, 970 F.2d 487, 488 (8th Cir. 1992).

198. *Id.* at 492.

199. *Id.* at 492-93. *See also supra* text accompanying notes 166-69.

200. *Hicks*, 970 F.2d at 492.

201. *Id.* (quoting *Burdine*, 450 U.S. at 256).

202. *Id.* at 492-93 (citing *Furnco*, 438 U.S. at 577). *See also supra* text accompanying notes 143-46.

203. *Hicks*, 113 S. Ct. at 2746, 2756.

204. *Id.* at 2746.

205. *Id.* (quoting *Burdine*, 450 U.S. at 255 n.8).

206. *Id.* at 2747 (citing *Burdine*, 450 U.S. at 252-54).

207. *Id.* at 254 (quoting 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 67 (1977) [hereinafter LOUISELL & MUELLER]).

208. *Id.* (citing *Burdine*, 450 U.S. at 254-55 and n.8).

209. *Id.* (citing *Burdine*, 450 U.S. at 253).

210. *Id.*

211. FED. R. EVID. 301.

212. *Id.* (quoting *Burdine*, 450 U.S. at 255 and n.10).

213. *Id.* (citing *Burdine*, 450 U.S. at 256).

214. *Id.* at 2747-48 (citing *Burdine*, 450 U.S. at 256).

215. *Id.* at 2748.

216. *Id.*

217. *Id.*

218. *Id.* at 2748-49 (citing *Burdine*, 450 U.S. at 254).

219. *Id.* at 2748 (citing FED. R. CIV. P. 50(a)(1) (jury trials), 52(c) (bench trials); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.9 (3d ed. 1985); 1 LOUISELL & MUELLER, *supra* note 207, § 70.

220. *Id.*

221. *Id.* at 2749 (quoting *Burdine*, 450 U.S. at 254).

222. *Id.* (citing *Burdine*, 450 U.S. at 253, 255).

223. *Id.* at 2749-50 (citations omitted).

224. *Id.* at 2749.

225. *Id.* at 2756-61.

226. *Id.* at 2761-66.

227. *Id.* at 2760 (quoting *Burdine*, 450 U.S. at 256).

228. *Id.* at 2757.

229. *Id.* at 2759 n.2 ("The question presented in this case is . . . whether the factual enquiry is narrowed by the *McDonnell Douglas* framework to the question of pretext.").

230. *Id.* at 2757-59.

231. *Id.* at 2759 (citing *Burdine*, 450 U.S. at 255-56).

232. *Id.*

233. *Id.* at 2758-59, 2761.

234. *Id.* at 2760-61.

235. *Id.* at 2761-66.

236. *Id.* at 2761-63.

237. *Id.* at 2764.

238. *Id.*

239. *Id.* at 2751.

240. *Id.*

241. *Id.* at 2752.

242. *Id.* at 2752-53.

243. *Id.* at 2751-52 (quoting *Burdine*, 450 U.S. at 253).

244. *Id.* at 2753 (quoting *McDonnell Douglas*, 411 U.S. at 805 and n.18).

245. *Id.* (quoting *Aikens*, 460 U.S. at 714).

246. *Id.* at 2754-56.

247. *Id.* at 2755.

248. *Id.*

249. *Id.* (citing FED. R. CIV. P. 11, 56(g); 18 U.S.C. § 1621).

250. *Id.* at 2755-56.

251. *Id.* at 2755.

252. *Id.*

253. *Id.*

254. *Id.* at 2750; Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 141-42 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994).

255. LeBlanc v. Great American Ins. Co., 6 F.3d 836, 842-43 (1st Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3556 (U.S. Jan. 24, 1994) (No. 93-1297).

256. *Id.* at 843.

257. Hazel v. U.S. Postmaster General, 7 F.3d 1, 4 (1st Cir. 1993) (citing *Hicks*, 113 S. Ct. at 2749); *LeBlanc*, 6 F.3d at 843 (citing *Hicks*, 113 S. Ct. at 2749).

258. *LeBlanc*, 6 F.3d at 843 (citing *Hicks*, 113 S. Ct. at 2749).

259. *Hazel*, 7 F.3d at 3-4 (citing *Hicks*, 113 S. Ct. at 2749); *LeBlanc*, 6 F.3d at 843 (citing *Hicks*, 113 S. Ct. at 2749).

260. Kassaye v. Bryant College, 999 F.2d 603, 606 (1st Cir. 1993).

261. FED. R. CIV. P. 56.

262. *LeBlanc*, 6 F.3d at 843.

263. Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2nd Cir. 1993) (citing *Hicks*, 113 S. Ct. at 2747); *Saulpaugh*, 4 F.3d at 141.

264. *Cosgrove*, 9 F.3d at 1039; *Saulpaugh*, 4 F.3d at 141-42.

265. *Cosgrove*, 9 F.3d at 1039 (citing *Hicks*, 113 S. Ct. at 2749); *Saulpaugh*, 4 F.3d at 142 (citing *Hicks*, 113 S. Ct. at 2745, 2749).

266. *Saulpaugh*, 4 F.3d at 142 (citing *Hicks*, 113 S. Ct. at 2749).

267. Geary v. Visitation of the Blessed Virgin Mary, 7 F.3d 324, 329 n.4 (3rd Cir. 1993).

268. Mitchell v. Data General Corp., 12 F.3d 1310, 1315, 1317 (4th Cir. 1993).

269. United States v. McMillon, 14 F.3d 948, 951 (4th Cir. 1994) (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

270. *Id.* at 952 (citing *Batson*, 476 U.S. at 97).

271. *Id.* (citing *Batson*, 476 U.S. at 98).

272. *Id.* (citing *Hicks*, 113 S. Ct. at 2748-50).

273. *Id.* at 953.

274. Moham v. Steego Corp., 3 F.3d 873, 875 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3617 (U.S. Mar. 21, 1994) (No. 93-1277).

275. Odom v. Frank, 3 F.3d 839, 850 (5th Cir. 1993) (citing *Hicks*, 113 S. Ct. at 2749). The Sixth Circuit interprets *Hicks* the same way in a footnote. Roush v. KFC National Management Co., 10 F.3d 392, 396 n.5 (6th Cir. 1993).

276. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957, 959 (5th Cir. 1993) (citing *Hicks*, 113 S. Ct. at 2747, 2749); *Moham*, 3 F.3d at 875 (citing *Hicks*, 113 S. Ct. at 2747); *Odom*, 3 F.3d at 850 (citing *Hicks*, 113 S. Ct. at 2749).

277. *Bodenheimer*, 5 F.3d at 958.

278. Rennie v. Dalton, 3 F.3d 1100, 1108 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994).

279. Pilditch v. Board of Education of the City of Chicago, 3 F.3d 1113, 1116 (7th Cir. 1993) (quoting *Hicks*, 113 S. Ct. at 2749), *cert. denied*, 114 S. Ct. 1065 (1994).

280. *Id.* (citing *Hicks*, 113 S. Ct. at 2749).

281. McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993) (quoting *Burdine*, 450 U.S. at 256).

282. *Pilditch*, 3 F.3d at 1116 (citing *Aikens*, 460 U.S. at 716).

283. *McNabola*, 10 F.3d at 513 (citing *Hicks*, 113 S. Ct. at 2749); *Pilditch*, 3 F.3d at 1116 (citing *Hicks*, 113 S. Ct. at 2749).

284. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994).

285. *See supra* notes 261-62, 277, and accompanying text.

286. FED. R. CIV. P. 56.

287. Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

288. *Id.*

289. *Id.*

290. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1417 (10th Cir. 1993) (citing *Hicks*, 113 S. Ct. at 2752 n.6).

291. *Id.* at 1418.

292. Hicks v. St. Mary's Honor Center, 2 F.3d 265 (8th Cir. 1993).

293. *Id.* at 266 (citing *Hicks*, 113 S. Ct. at 2745); *see also supra* text accompanying notes 199-200.

294. *Id.* (citing *Hicks*, 113 S. Ct. at 2745).

295. *Id.* at 266-67 (citing *Hicks*, 113 S. Ct. at 2749).

296. *Id.* at 267.

297. *Anderson*, 13 F.3d at 1123; *see also supra* text accompanying notes 152-53.

298. *Anderson*, 13 F.3d at 1121-24.

299. S. 1776, 103d Cong., 1st Sess. § 1 (1993) [hereinafter S. 1776]; H.R. 3680, 103d Cong., 1st Sess. § 1 (1993) [hereinafter H.R. 3680]; 139 CONG. REC. S16,948 (daily ed. Nov. 22, 1993) (statement of Sen. Metzenbaum) [hereinafter Metzenbaum]; 139 CONG. REC. E3080 (daily ed. Nov. 24, 1993) (statement of Rep. Owens) [hereinafter Owens].

300. S. 1776, *supra* note 299, § 3; H.R. 3680, *supra* note 299, § 3; Metzenbaum, 139 CONG. REC. at S16,948-50; Owens, 139 CONG. REC. at E3080.

301.

> (a) STANDARDS. In a case or proceeding brought under Federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, nondiscriminatory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a

trier of fact, by a preponderance of the evidence, that --

(1) a discriminatory reason more likely motivated the respondent; or

(2) the respondent's proffered explanation is unworthy of credence.

S. 1776, *supra* note 299, § 4; H.R. 3680, *supra* note 299, § 4.

302. S. 1776, *supra* note 299, § 2; H.R. 3680, *supra* note 299, § 2; Metzenbaum, 139 CONG. REC. at S16,949-50; Owens, 139 CONG. REC. at E3080-81.

303. 139 CONG. REC. S16,935 (daily ed. of Nov. 22, 1993); *Bill Tracking Report*, S. 1776, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legislation Library, Bill Tracking File.

304. 139 CONG. REC. H10,986 (daily ed. of Nov. 22, 1993); *Bill Tracking Report*, H.R. 3680, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legislation Library, Bill Tracking File.

305. *Bill Forecasts Report*, S. 1776, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legislation Library, Bill Forecasts File; *Bill Forecasts Report*, H.R. 3680, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legislation Library, Bill Forecasts File.

306. *See supra* text accompanying notes 70-80.

307. *See supra* text accompanying notes 81-85.

308. *See supra* text accompanying notes 86-96.

309. *See supra* text accompanying notes 97-105.

310. *See supra* text accompanying notes 106-16.

311. *Hicks*, 113 S. Ct. at 2752-54, 2757-66 (Souter, J., dissenting); *Burdine*, 450 U.S. at 256.

312. *See supra* text accompanying notes 225-38.

313. *See supra* text accompanying notes 239-53.

314. *See* Mendez, *supra* note 149, at 1131 ("[The Supreme] Court itself is responsible for the uncertainties surrounding the burden of proof in disparate treatment cases. These uncertainties stem from the Court's insistence on fashioning novel rules and terminology to govern these cases, while ignoring the general analysis that usually allocates burdens of proof in civil cases under federal law."); *see also supra* text accompanying notes 106-16 (discussing *Price Waterhouse* exception to *McDonnell Douglas-Burdine* analysis).

315. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 301[02] at 301-32; 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 462, 472 (4th ed. 1992) [hereinafter MCCORMICK]; *see generally* JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 313-52 (1898) [hereinafter THAYER].

316. MCCORMICK, *supra* note 315, at 462; Mendez, *supra* note 149, at 1145; *see also* Mackowik v. Kansas City, St. Joseph's & Council Bluffs R.R. Co., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906) ("[P]resumption[s] . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."); 9 JOHN H. WIGMORE, EVIDENCE § 2491(2) n.4 (Chadbourn rev. 1981) ("[P]resumptions are like pitches in the strike zone which place the batter in peril of striking out, unless he hits a fair ball.") [hereinafter WIGMORE].

317. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-1; Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward Theory of Procedural Justice*, 34 VAND. L. REV., 1205, 1222 (1981).

318. 2 MCCORMICK, *supra* note 315, at 449.

319. 9 WIGMORE, *supra* note 316, § 2491(2).

320. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-3; 2 MCCORMICK, *supra* note 315, at 462; 9 WIGMORE, *supra* note 316, § 2491(2).

321. 1 WEINSTEIN & BERGER, *supra* note 42, ¶¶ 300[01] at 300-4, 301[02] at 301-32; 2 MCCORMICK, *supra* note 315, at 462; 9 WIGMORE, *supra* note 316, § 2491(2).

322. 2 MCCORMICK, *supra* note 315, at 462. *See also* FED. R. CIV. PROC. 50(a) (Judgment as a Matter of Law in Actions Tried by Jury), 52(c) (Findings by the Court, Judgment on Partial Findings).

323. 2 MCCORMICK, *supra* note 315, at 462.

324. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-5; 9 WIGMORE, *supra* note 316, § 2491(2).

Presumptions and inferences are sometimes confused. In *Furnco*, for example, the Supreme Court stated incorrectly that the employer's articulation of a nondiscriminatory reason for its allegedly discriminatory employment action "dispel[s] the adverse *inference* from a prima facie showing under *McDonnell Douglas*," *Furnco*, 438 U.S. at 578 (emphasis added), when it is the presumption that is dispelled. An inference is a deduction warranted by human reason and experience that the factfinder *may* make from established facts, whereas a presumption is merely a

procedural device that shifts the burden of producing evidence to the party against whom it operates. Belton, *supra* note 317, at 1222.

325. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972); S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7074-75; H.R. REP. NO. 650, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7092.

The proposed Federal Rules of Evidence were drafted pursuant to the Supreme Court's authority under 28 U.S.C. § 2072 to prescribe general rules for practice and procedure before the district courts and the courts of appeal. In reality, the Court did not write the proposed Rules. An advisory committee named by the Judicial Conference wrote the Rules. The Court's role was merely as the conduit to Congress, and its approval of the proposed Rules perfunctory. 56 F.R.D. at 185 (Douglas, J., dissenting).

326. Advisory Committee's Note to Rule 301, *reprinted in* 1 WEINSTEIN & BERGER, *supra* note 42, at 301-10, and 9 WIGMORE, *supra* note 316, § 2493h.

327. 2 MCCORMICK, *supra* note 315, at 472; 9 WIGMORE, *supra* note 316, § 2493c.

328. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-5; 2 MCCORMICK, *supra* note 315, at 470-71; *see generally* EDMUND M. MORGAN, SOME PROBLEMS OF PROOF 74-81 (1956).

329. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-5.

330. *Rules of Evidence*, 56 F.R.D. at 208; 9 WIGMORE, *supra* note 316, § 2493h.

331. *See supra* text accompanying notes 106-16.

332. H.R. REP. NO. 650, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7080-81.

333. S. REP. NO. 1277, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055-56.

334. CON. REP. NO. 1597, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099. *See generally* 1 WEINSTEIN & BERGER, *supra* note 42, at 301-1 to 301-9; 9 WIGMORE, *supra* note 316, § 2493h.

335. Hugh J. Beard, Jr., *Title VII and Rule 301: An Analysis of the* Watson *and* Antonio *Decisions*, 23 AKRON L. REV. 105, 124-25 (1989).

336. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976).

337. *McDonnell Douglas* was decided on May 14, 1973. 411 U.S. at 792. The Federal Rules of Evidence became effective 180 days after they were enacted by Congress on January 2, 1975. Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

338. *Burdine*, 450 U.S. at 256 n.8 ("See Fed.Rule [sic] Evid. 301.").

339. *Hicks*, 113 S. Ct. at 2747 ("[T]he *McDonnell Douglas* presumption . . . operates like all presumptions, as described in Rule 301 of the Federal Rules of Evidence . . . ."), 2749 ("[T]he Court of Appeals . . . disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof . . . ."), 2753 (citing Rule 301 as one of the "authorities setting forth the classic law of presumptions"), 2759 (Souter, J., dissenting) (citing Rule 301 for the proposition that the presumption of discrimination established by the plaintiff's prima facie case is not resurrected when the plaintiff attempts to show pretext).

340. *Furnco*, 438 U.S. 567; *Sweeney*, 439 U.S. 24; *Aikens*, 460 U.S. 711.

341. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 300[01] at 300-4; 2 MCCORMICK, *supra* note 315, at 473 n.64 (citing *Burdine*); Beard, *supra* note 335, at 137-39.

342. "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules . . . ." FED. R. EVID. 301.

343. *See generally* 42 U.S.C. §§ 2000e to -17.

344. *But see supra* text accompanying notes 299-305.

345. *Burdine*, 450 U.S. at 254 and n.7 ("*McDonnell Douglas* should have made it apparent that in the Title VII context [the Supreme Court] use[s] 'prima facie case' in the . . . sense" that it "may denote the establishment of a legally mandatory, rebuttable presumption . . . ."); *Hicks*, 113 S. Ct. at 2747.

346. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53.

347. 113 S. Ct. at 2747.

348. *Id.*

349. FED. R. CIV. PROC. 50(a), 52(c).

350. *See supra* note 317 and accompanying text.

351. *Compare* FED. R. EVID. 301 *and supra* notes 316-20 and accompanying text *with McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254; *and Hicks*, 113 S. Ct. at 2747.

352. *Compare* FED. R. EVID. 301 *and supra* note 320 and accompanying text *with Burdine*, 450 U.S. at 254-55 and n.8; *and Hicks*, 113 S. Ct. at 2747-49.

353. *Burdine*, 113 S. Ct. at 254; *Hicks*, 113 S. Ct. at 2748 (citing FED. R. CIV. PROC. 50(a), 52(c)); 2 MCCORMICK, *supra* note 315, at 462; 9 WIGMORE, *supra* note 316, § 2491(2).

354. *Compare supra* note 321 and accompanying text *with Burdine*, 450 U.S. at 255 and n.10 (citing THAYER, *supra* note 315, at 346) *and Hicks*, 113 S. Ct. at 2747-49.

355. *Compare supra* note 324 and accompanying text *with Hicks*, 113 S. Ct. at 2749.

356. *McDonnell Douglas*, 411 U.S. at 804-05 and n.18; *Burdine*, 450 U.S. at 255-56; *Hicks*, 113 S. Ct. at 2747.

357. *Compare* FED. R. EVID. 301 *with Burdine*, 450 U.S. at 253, 255-56 ("The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.") *and Hicks*, 113 S. Ct. at 2747-49.

358. *Patterson*, 491 U.S. at 187-88.

359. *Hicks*, 113 S. Ct. at 2749-51.

360. *Id.* at 2760-61 (Souter, J., dissenting).

361. *Compare id.* at 2746-47 *with id.* at 2757-58 (Souter, J., dissenting).

362. *Burdine*, 450 U.S. at 256.

363. *Id.* (citing *McDonnell Douglas*, 411 U.S at 804-05).

364. *McDonnell Douglas*, 411 U.S at 804-05.

365. *Id.* at 805 (Plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.") and n.18 (Plaintiff "must be given a full and fair opportunity to

demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised."); *Hicks*, 113 S. Ct. at 2753 (citing *McDonnell Douglas*, 411 U.S. at 805 and n.18).

366. 42 U.S.C. § 2000e-2(a)(1).

367. *Griggs*, 401 U.S. at 429-30.

368. *Id.* at 431 (emphasis added).

369. Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

370. *McDonnell Douglas*, 411 U.S. at 804-05; *Burdine*, 450 U.S. at 256; *Hicks*, 113 S. Ct. at 2747, 2749.

371. *Hicks*, 113 S. Ct. at 2479.

372. *Id.*

373. *Id.* at 2757, 2761-62 (Souter, J., dissenting).

374. *See supra* notes 131-37 and accompanying text (discussing changes wrought by the Civil Rights Act of 1991).

375. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 301[02] at 301-32; *see* Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 and n.3 (10th Cir. 1993) (stating instruction that jury may infer existence of discrimination from the existence of other facts after plaintiff proves pretext "clearly sets forth the proper allocation of proof under *Burdine* and *McDonnell [Douglas]* . . . .").

376. *See supra* text accompanying notes 327-31.

377. Mendez, *supra* note 149, at 1146 n.94.

378. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 301[02] at 301-31.

379. *Id.* at ¶ 301[02] at 301-31 to 301-32; 2 MCCORMICK, *supra* note 315, at 462; *cf. Faulkner*, 3 F.3d at 1425 and n.3 (stating that instruction that jury may infer existence of discrimination from the existence of other facts, but does not mention extinguishment of presumption, was proper).

380. Mendez, *supra* note 149, at 1145-46; 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 301[02] at 301-32. For example, the instruction approved in *Faulkner* read in pertinent part as follows:

> If a plaintiff has proven [a prima facie case], then the defendant must come forward and rebut the plaintiff's case by producing some evidence that the failure to hire the plaintiff was based upon a legitimate, non-discriminatory reason. If the plaintiff can then show by a preponderance of the evidence that the reasons given by the defendant are a pretext, which is a phony or unbelievable reason for the failure to hire the plaintiff, you may infer that the real reason for the failure to hire was the plaintiff's [prohibited classification].

3 F.3d at 1425.

381. 1 WEINSTEIN & BERGER, *supra* note 42, ¶ 301[02] at 301-32.

382. *Hicks*, 113 S. Ct. at 2757 (Souter, J., dissenting) (citing *Burdine*, 450 U.S. at 252-53).

383. *Id.* at 2757, 2761-62 (Souter, J., dissenting).

384. *See supra* notes 299-305 and accompanying text.

385. *See supra* text accompanying notes 362-70.

386. *See supra* text accompanying notes 254-98.

387. *Hicks*, 970 F.2d at 491; *Hicks*, 756 F. Supp. at 1249-50.

388. *See supra* notes 21-22 and accompanying text.

389. *Hicks*, 970 F.2d at 492; *Hicks*, 756 F. Supp. at 1251.

390. *Hicks*, 970 F.2d at 491-92 (citing *Burdine*, 450 U.S. at 256).

391. *Id.* at 492-93.

392. *Id.* at 492.